Supreme Court, U.S.
FILED

931158 JAN 18 1994

OFFICE OF THE CLERK

No. —

IN THE

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Petitioner,

v.

EMMETT R. DAVIS, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

PETITION FOR WRIT OF CERTIORARI

STEPHEN L. BLACK
GRAYDON, HEAD & RITCHEY
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202

Counsel for Petitioner

Of Counsel:

ANTHONY F. RECINE, ESQ.
1740 Broadway
New York, New York 10019
(212) 70[illegible]-2200

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

178 pp

QUESTIONS PRESENTED

1. Whether under RICO §1962(c) a corporation can be both the person and the enterprise with which it is associated, so as to be held liable for the acts of its own employees and agents in the conduct of the corporation's business?

2. Whether a federal court in diversity jurisdiction should construe a state-created fee-shifting statute as it believes the highest state court would rule in the present case?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Sixth Circuit were:

Plaintiffs-Appellees	Defendant-Appellants (and Cross-Appellees)
Emmett R. Davis (Cross-Appellant)	The Mutual Life Insurance Company Company of New York[1]
Margaret A. Davis	Trans World Assurance Company[2]
Donald R. Griffey	
Sue A. Griffey	
Joseph F. Feldkamp, Administrator of the Estate of Herbert Adler, deceased	
Gertrude Adler	
Robert Storms	
Roslyn Storms	
James R. Abney	
George Lamb	
Janie D. Lamb	
Alfred R. Clark	
Madgalene Clark	
Shirley Johnson	
Samuel R. Johnson	
Wanda L. Johnson	
Byrd Lenard	

---

[1]The Mutual Life Insurance Company of New York has no parent corporation nor any subsidiaries not wholly owned.

[2]To the best of petitioner's knowledge and information, Trans World Assurance Company has no parent corporation nor any subsidiaries not wholly owned.

Parties to the Proceeding Continued

Charles Lenard
Deloris J. Lenard
Henrietta Lenard
Robert Lenard, Jr.
Charles Page
Wanda Page
Sheila A. Poast
Thomas R. Poast
Margaret Smith
Edward L. Smith
Lola M. Terrell
Wilbur Terrell, Jr.

The parties to the proceeding in the United States District Court for the Southern District of Ohio included all the above and Donald S. Fletcher and Fletcher Insurance Associates as defendants.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING . . . . . ii, iii

TABLE OF CONTENTS . . . . . iv-vi

TABLE OF AUTHORITIES . . . . . vi-viii

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

STATUTES. 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

I. There is a split among the Courts of Appeals applying RICO §1962(c) as to whether a corporation as the "person" can associate with an enterprise consisting of its own employees, agents, subsidiaries or divisions 6

A. To be liable under RICO §1962(c), the corporate "person" must be separate and distinct from the "enterprise" with which it is associated 6

B. The doctrine of respondeat superior should not apply to corporate employers of persons liable under RICO §1962(c) 13

C. If Fletcher Insurance Associates was a separate and distinct enterprise, MONY did not operate or participate in the management of that enterprise so as to be liable under RICO §1962(c) 14

Table of Contents Continued

Page

D. Conclusion: This Court should resolve the split between the Courts of Appeals as to when a corporate person is separate and distinct from the enterprise for RICO purposes 15

II. A federal court in diversity jurisdiction should construe a state-created fee-shifting statute as it believes the highest state court would construe it in the present case 16

CONCLUSION 20

APPENDIX A-1

Statutes

18 U.S.C. §1961 . . . . . A-2
18 U.S.C. §1962 . . . . . A-5
18 U.S.C. §1964 . . . . . A-6
Ohio Revised Code §1345.09 . . . . . A-7

Lower Court Proceedings

Opinion of the Court of Appeals, filed September 21, 1993 . . . . . A-9

Order of the Court of Appeals denying petition for rehearing, filed October 19, 1993 . . . . . A-52

Judgment of the District Court, entered March 8, 1990 . . . . . A-53

Table of Contents Continued

Page

Order of the District Court denying all motions for judgment notwithstanding the verdict or for new trial, filed May 18, 1990 . . . . . A-83

Order of the District Court awarding attorneys' fees, filed August 10, 1990 . . . . . A-99

Order of the District Court correcting order awarding attorneys' fees, filed August 22, 1990 A-115

State Court Decisions

Bittner v. Tri-County Toyota, Inc., 58 Ohio St.3d 143 (1991) A-117

Freeman v. Crown City Mining, Inc., No. 92 CA 41, 1993 Ohio App. Lexis 5062 (4th App.Dist) . A-125

Hall v. Lacheta, No. 92APO20013, 1992 Ohio App. Lexis 5945 (5th App.Dist.) A-142

TABLE OF AUTHORITIES

Page

Atkinson v. Anadarko Bank & Trust Co., 808 F.2d 438, 441 (5th Cir.), *cert. denied*, 483 U.S. 1032 (1987) . . . 9, 10

B.F. Hirsch v. Enright Refining Co., Inc., 751 F.2d 628, 633-34 (3d Cir. 1984) 9

Bittner v. Tri-County Toyota, Inc., 58 Ohio St.3d 143, 567 N.E.2d 464, 467 (1991) 5, 17 18

Table of Authorities Continued

Page

Brady v. Dairy Fresh Products Co., 974 F.2d 1149, 1153-54 (9th Cir. 1992) 13

Brittingham v. Mobil Corp., 943 F.2d 297, 301 (3d Cir. 1991) 8-10 . . . . . 9, 11

City of Burlington v. Dague, 112 S.Ct. 2638 (1992) . . 5, 16, 18

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) . . 17

Freeman v. Crown City Mining, Inc., 1993 Ohio App. Lexis 5062 at *20-*23 (4th Dist.Ct.App. 1993) 18, 19

Hall v. Lacheta, 1992 Ohio App. Lexis 5945 at *6 (5th Dist.Ct.App. 1992) 18

Haroco v. American National Bank & Trust Co., 747 F.2d 384, 402 (7th Cir. 1984), aff'd on other grounds, 473 U.S. 606 (1985) 9

Hensley v. Eckerhart, 461 U.S. 424 (1983) 17

Hofstetter v. Fletcher, 905 F.2d 897 (6th Cir. 1988) . . 8

Meredith v. Winter Haven, 320 U.S. 228, 238 (1943) . 17

Odishelidze v. Aetna Life & Casualty Co., 853 F.2d 21, 23-24 (1st Cir. 1988) 9, 10, 12

Table of Authorities Continued

Page

Reves v. Ernst & Young, 113 S.Ct. 1163, 1171-72 (1993). 14, 15, 16

Schofield v. First Commodity Corp., 793 F.2d 28 (1st Cir. 1986) 13

U.S. v. Hartley, 678 F.2d 961, 988 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983) 9

Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 543 (1941). 17

Yellow Bus Lines Inc. v. Local Union 639, 839 F.2d 782 (D.C.Cir. 1988), rev'd on other grounds, 492 U.S. 914 (1989) 10, 12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

No. _____

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK

Petitioner

TRANS WORLD ASSURANCE COMPANY,
DONALD S. FLETCHER, and
FLETCHER INSURANCE ASSOCIATES

v.

EMMETT R. DAVIS, et al., *Respondents*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 6 F.3d 367 and reported unofficially at 1993 U.S.App. Lexis 24254. There are no reported opinions of the District Court.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 21, 1993. On October 19, 1993, the Court of Appeals entered an order denying a motion for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES

The Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961 to 1968, provides in §1962(c):[3]

* * *

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

* * *

18 U.S.C. §1961 provides the following pertinent definitions:

* * *

> (3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;
>
> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or

---

[3]For the full text of this section, please see the Appendix, p. A-5.

group of individuals associated in fact although not a legal entity;

* * *

Ohio Rev. Code §1345.09(F) states as follows:

* * *

The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if either of the following apply:

(1) The consumer complaining of the act or practice that violated this chapter has brought or maintained an action that is groundless, and the consumer filed or maintained the action in bad faith;

(2) The supplier has knowingly committed an act or practice that violates this chapter.

STATEMENT OF THE CASE

This case arises from life insurance sales to the respondents through the techniques of Mr. Donald S. Fletcher and his associates who collectively comprised Fletcher Insurance Associates, an unincorporated group. The primary focus of Mr. Fletcher was to instruct individuals (including respondents) on methods to avoid personal income tax liability. According to Mr. Fletcher, if an individual formed a home-based business (e.g., Amway), he could reduce and even eliminate his federal income tax liability by writing off nearly all household expenses associated with the business as deductible business expenses. Mr. Fletcher presented this theory to his potential clients at tax-oriented seminars during which he suggested that he would assist the clients in finding tax return preparation services and tax audit services to carry out his tax plan. His clients were or became involved in home-based businesses. Mr.

Fletcher and his associates earned commissions through life insurance policies purchased by the clients with part of the tax savings. The tax savings also were used to purchase the Amway inventory.

Mr. Fletcher and his associates initially represented New York Life Insurance Company and sold its policies. In 1980, he and his associates became affiliated with the Mutual Life Insurance Company of New York ("MONY," the petitioner herein), he as an employee and an agent and his associates as agents. In late 1983, he once again changed insurance company affiliation, this time favoring Trans World Assurance Company ("TWA") insurance products.

From 1980 to 1983, twenty-five of the plaintiffs[4] were insured with MONY. During this period, the respondents knowingly filed exaggerated and misleading tax returns with the Internal Revenue Service. The tax returns of the plaintiffs were audited and despite Mr. Fletcher's assurances to his clients that the IRS would not prevail, the deductions for home-based businesses were largely disallowed and additional taxes, penalties and interest were assessed.

The twenty-nine plaintiffs in the present action were all recipients of Mr. Fletcher's improper tax advice. They filed this action for damages alleging Ohio common law and statutory claims including violation of Ohio's Consumer Sales Practices Act ("CSPA"), of which the breach entitled them to recover their reasonable attorney fees. They also included claims based on RICO §1962(c) and (d). Jurisdiction was premised on 28 U.S.C. §§1331, 1332 and 1337 and 18 U.S.C. §§1964(c) and 1965 as well as the doctrine of pendent jurisdiction as to the state law claims. Named as defendants were Mr. Fletcher, Fletcher Insurance Associates,

---

[4]The remaining four plaintiffs bought life insurance policies after 1983 from co-defendant Trans World Assurance Company.

MONY and TWA. After a twenty-day trial, the jury found all defendants liable under state law claims for common law fraud, breach of fiduciary duty, breach of contract and violations of Ohio's CSPA. With respect to the RICO claims, it found that Fletcher and MONY were liable persons under §1962(c), but not TWA. It further found no violation of §1962(d) (conspiracy to violate §1962(c)) by any defendant, but that Mr. Fletcher and Fletcher Insurance Associates had participated in a common law conspiracy while MONY and TWA had not.

Based on the jury's findings and the Court's allocation of damages, judgment was entered in plaintiffs' favor against MONY in the amount of $2,280,034.66, treble the compensatory damages found by the jury, as RICO provides. Various post-judgment motions were denied. The District Court further awarded the plaintiffs $586,055.74 in attorneys fees and expenses against MONY, under the authority of both RICO and the Ohio CSPA.

MONY and TWA appealed to the Sixth Circuit Court of Appeals under 28 U.S.C. §1291, and the named plaintiff cross-appealed. The Court of Appeals affirmed the liability of MONY on the state law and RICO claims, but found the evidence insufficient to support the jury's verdict against TWA and reversed as to that defendant. Following the dictate of *City of Burlington v. Dague*, 112 S.Ct. 2638 (1992), the Court held that the District Court's use of an enhancement factor in the award of attorney fees was improper under RICO, but affirmed the use of the same multiplier to calculate a reasonable attorney fee under the Ohio Consumer Sales Practices Act, citing *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 567 N.E.2d 464, 467 (1991). It declined to give the cross-appealing plaintiff further relief via his cross-appeal directed to issues of apportionment of damages or a new trial on punitive damages.

The Court of Appeals' decision was entered September 21, 1993. The plaintiffs filed a petition for rehearing on October 5, 1993, which was denied by order entered October 19, 1993.

REASONS FOR GRANTING THE WRIT

I. There is a split among the Courts of Appeals applying RICO §1962(c) as to whether a corporation as the "person" can associate with an enterprise consisting of its own employees, agents, subsidiaries or divisions.

A. To be liable under RICO §1962(c), the corporate "person" must be separate and distinct from the "enterprise" with which it is associated.

Section 1962(c) of RICO provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

It is undisputed in the present case that the plaintiffs proceeded against MONY under RICO §1962(c) naming MONY as the corporate "person" and Fletcher Insurance Associates as the "enterprise"[5] in whose affairs MONY allegedly participated indirectly in conducting a pattern of racketeering activity. The fallacy of this theory is that by becoming a "captive" MONY insurance group, Fletcher Insurance Associates became a part of the MONY corporate entity for RICO purposes, and thus there was no separate or distinct "enterprise."

---

[5]Plaintiffs' attorneys argued throughout trial that Fletcher Insurance Associates was the RICO "enterprise" and Fletcher Insurance Associates was eliminated as a party on the jury verdict form in the RICO portion of the form.

The evidence presented at trial showed irrefutably that Mr. Fletcher and his colleagues all became exclusively MONY agents at the time they left New York Life. In April of 1980, New York Life terminated its relationship with Mr. Fletcher and his fellow agents pursuant to their written contracts. Mr. Fletcher and his partner Mr. Neil McKelvie then approached MONY to inquire if they could be appointed agents to sell life insurance. MONY launched an investigation and review of Fletcher Insurance Associates which lead to the conclusion that, although their *modus operandi* for New York Life might be characterized a "fast-track hustle," given proper supervision and controls they might mend "past errant ways" and "abandon marketing philosophies inconsistent with the fundamental principles by which MONY was both founded and is now guided."[6] Mr. Fletcher and his associates were then hired and trained as MONY agents, and given contracts allowing them to sell insurance only for MONY. In short, MONY took a calculated risk that the Fletcher group could be absorbed into MONY and cleansed of the unacceptable aspects of its marketing techniques.

As the jury determined below, MONY was held liable for Mr. Fletcher's continuing conduct. The jury awarded plaintiffs compensatory damages (i.e., additional taxes, penalties and interest assessed against plaintiffs by the Internal Revenue Service) for the state law claims of breach of contract, fraud, and breach of Ohio's CSPA. In addition, MONY was required to disgorge all profits by the jury award of $28,139.96 in the aggregate as punitive damages, which represented all premiums received from these plaintiffs. The jury was further instructed as to the RICO claim:

> If you should find that there is one enterprise, then all defendants associated with that enterprise are liable to the plaintiffs, if the remaining elements of this RICO claim are established.

---

[6]Plaintiff's Exhibit 101, pp. 4-5.

* * *

> ...for purposes of the RICO statute, the "person" and the "enterprise" cannot be the same.[7]

However, no evidence could support the jury's finding of RICO §1962(c) liability. Since MONY had assimilated the Fletcher enterprise into its corporate structure, under RICO it became both the "enterprise" and the "person."

The District Court and Court of Appeals failed to recognize that Fletcher Insurance Associates could not pass the distinctness test. In overruling MONY's motion for judgment NOV, the District Court simplistically concluded that, because the jury had properly been instructed that the same individual or corporation cannot be both the "enterprise" and "person" under RICO, the jury's verdict must stand, largely ignoring the evidentiary issue.[8] On appeal, the Court of Appeals cited a number of facts[9] evidencing the independence of the Fletcher organization. Its ultimate conclusion on this point was that:

* * *

> Nothing in the facts before us, including Donald Fletcher's agreement to sell only MONY life insurance from June 1980 through November 1983, persuades us that the independence of FIA diminished to such an

---

[7]Jury Instructions, pp. 31, 32.

[8]Order of May 18, 1990, p. A-88 of Appendix.

[9]The Court even cited its own opinion in an earlier case involving a RICO claim against Fletcher Insurance Associates, from which New York Life had been dropped as a party. Slip Opinion at A-24, citing *Hofstetter v. Fletcher*, 905 F.2d 897, 903 (6th Cir. 1988).

> extent that the jury could reasonably conclude only that FIA was, during that interval, indistinguishable from MONY.[10]

* * *

By framing the issue in this fashion, the Court of Appeals applied the wrong test. The issue as defined by caselaw is not whether the enterprise is "independent" from the corporate "person," but whether the enterprise is sufficiently separate and distinct. The circuit courts of appeal are split on how one judges whether the enterprise is distinct from the person. To some courts of appeals, if the "person" is organized as a separate legal entity (such as a parent or subsidiary corporation), then it is sufficiently distinct to be liable under RICO §1962(c). *Haroco v. American National Bank & Trust Co.*, 747 F.2d 384, 402 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985); *U.S. v. Hartley*, 678 F.2d 961, 988 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983). In other circuits, a parent corporation or wholly-owned subsidiary or corporate division is not sufficiently distinct to incur liability under RICO §1962(c). *Brittingham v. Mobil Corp.*, 943 F.2d 297, 301 (3d Cir. 1991); *B.F. Hirsch v. Enright Refining Co., Inc.*, 751 F.2d 628, 633-34 (3d Cir. 1984). *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5th Cir.), *cert. denied*, 483 U.S. 1032 (1987); *Odishelidze v. Aetna Life & Casualty Co.*, 853 F.2d 21, 23-24 (1st Cir. 1988). As noted by the Third Circuit in the *Brittingham* case:

> We agree with the district court that the alleged enterprise is not distinct from the defendants for purposes of the *Enright* rule. We believe a §1962(c) enterprise must be more than an association of individuals or entities conducting the normal

---

[10]Slip Opinion at A-24-25. Remarkably, at one point in its decision, the Court opines that liability could be predicated upon "some other association-in-fact having taken place largely through the acts of Fletcher." No evidence was presented at trial as to the existence of any other enterprise.

affairs of a defendant corporation. A corporation must always act through its employees and agents, and any corporate act will be accomplished through an "association" of these individuals or entities. Consequently, the *Enright* rule would be eviscerated if a plaintiff could successfully plead that the enterprise consists of a defendant corporation in association with employees, agents, or affiliated entities acting on its behalf. The distinctiveness requirement ensures that RICO sanctions are directed at the persons who conduct the racketeering activity, rather than the enterprise through which the activity is conducted. Therefore, we must examine the enterprise allegation to determine whether it is no more than an association of individuals or entities acting on behalf of a defendant corporation. Our decision is in accord with numerous courts that have rejected attempts to circumvent the distinctiveness requirement by alleging enterprises that are merely combinations of individuals or entitles affiliated with a defendant corporation.[2] [Emphasis added.]

---

[2] *See, e.g., Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 883 F.2d 132. 139-41 (D.C.Cir. 1989) (enterprise alleged as association of defendant union with its business agent and trustee), *adopted on reh'g*, 913 F.2d 948, 951 (D.C.Cir. 1990) (en banc), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2839, 115 L.Ed.2d 1007 (1991); *Old Time Enters., Inc. v. International Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989) (association of officers or employees conducting business of corporation is not distinct from corporation); *Odishelidze v. Aetna Life & Casualty Co.*, 853 F.2d 21, 23-24 (1st Cir. 1988) (enterprise alleged as association of defendant insurance company, its subsidiaries, and employees); *NCNB Nat'l Bank v. Tiller*, 814 F.2d 931, 936 (4th Cir. 1987) (parent of defendant bank), *overruled on other grounds, Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840-42 (4th Cir. 1990) (in banc); *Atkinson v. Anadarko Bank and Trust Co.*, 808 F.2d 438, 440-41 (5th Cir. 1987) (association of defendant bank, its holding company, and employees), *cert. denied*, 483 U.S. 1032, 107 S.Ct. 3276, 97 L.Ed.2d 780 (1987); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1290-92 (4th Cir. 1982) (unincorporated division of defendant corporation), *overruled on other grounds, Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840-42 (4th Cir. 1990) (in banc); *Moffatt Enters., Inc. v. Borden, Inc.*, 763 F.Supp. 143, 149 (W.D.Pa. 1990) (association of defendant

company, its employees, and advertising agency); *Newfield v. Shearson Lehman Bros.*, 699 F.Supp. 1124, 1127 (E.D.Pa. 1988) (association of defendant company and two employees); *Hanline v. Sinclair Global Brokerage Corp.*, 652 F.Supp. 1457, 1462 (W.D.Mo. 1987) (association of defendant corporation and three employees); *Gilbert v. Prudential-Bache Sec., Inc.*, 643 F.Supp. 107, 109 (E.D.Pa. 1986) (association of defendant brokerage firm and its branches); *Tarasi v. Dravo Corp.*, 613 F.Supp. 1235, 1236-67 (W.D.Pa. 1985) (association of defendant corporation and its agent.

Brittingham v. Mobil Corp., 943 F.2d at 301. The *Brittingham* court held that a corporate defendant and its subsidiary and their advertising agencies could not be held liable under RICO §1962(c) for engaging in allegedly fraudulent activities in the conduct of their business operations.

By taking the position that Fletcher Insurance Associates was a separate and distinct organization, notwithstanding the fact that each of the members of that agency had signed an agreement to be exclusively a MONY agent, the Sixth Circuit adopted the minority view that any evidence of an independent legal existence is a sufficient basis to find that an affiliated group is separate and distinct enough to trigger §1962(c) liability for its parent corporation. Such a rule is excessively formalistic in approach and extends RICO liability well beyond the scope of the statute. The better rule is that the separate and distinct corporation must have a distinctive role in the operation in order to be liable as a "person" under RICO §1962(c). As stated by the Third Circuit in the *Brittingham* case:

> Without allegations or evidence that the defendant corporation had a role in the racketeering conduct that was distinct from the undertakings of those acting on its behalf, the distinctiveness requirement is not satisfied. [Emphasis supplied.]

943 F.2d at 302. The heart of petitioner's argument in the present case is that there was no evidence by which the jury could find that MONY had any role in the life insurance sales that was different from the role of Mr. Fletcher and the other MONY agents.

The District of Columbia Circuit took a similar position in *Yellow Bus Lines Inc. v. Local Union 639*, 839 F.2d 782 (D.C.Cir. 1988), *rev'd on other grounds*, 492 U.S. 914 (1989), where a labor union stood accused of RICO §1962(c) violations during a recognition strike. Named as defendants were the local union and its business agent. The trial court dismissed the RICO claims, holding that the local union could not be both the "person" and the "enterprise" in the case. The Court of Appeals affirmed holding that the members of the enterprise association may not simply be subdivisions, agents or members of the defendant organization:

* * *

> In short, an organization cannot join with its own members to do that which it normally does and thereby form an enterprise separate and apart from itself.

839 F.2d at 791. In the present case, MONY has done just that, and no more. *See also Odishelidze v. Aetna Life & Casualty Co.*, 853 F.2d 28 (1st Cir. 1988) (holding life insurance company and its subsidiaries, officers and employees cannot be both "person" and "enterprise" under RICO §1962(c)).

In the *Enright Refining Co.* case, the Third Circuit noted:

> One of the Congressional purposes in enacting RICO was to prevent the takeover of legitimate businesses by criminals and corrupt organizations. It is in keeping with that Congressional scheme to orient section 1962(c) toward punishing the infiltrating criminals rather than the legitimate corporation which might be an innocent victim of the racketeering activity in some circumstances.

751 F.2d at 633-34 (citations omitted). The overwhelming irony of the Sixth Circuit Court of Appeals' decision in the present case is that it does just that -- it uses RICO to punish a legitimate business (MONY) for the activities of the infiltrating criminal. To cling to the fallacy that Fletcher Insurance Associates is the "legitimate" and

"innocent" victim makes a mockery of the well-reasoned rule of law applying the RICO statute.

B. The doctrine of respondeat superior should not apply to corporate employers of persons liable under RICO §1962(c).

Beginning perhaps with the case of *Schofield v. First Commodity Corp.*, 793 F.2d 28 (1st Cir. 1986), a body of law has emerged in the Courts of Appeal to the effect that the doctrine of respondeat superior should not be applied to hold the corporate employers of RICO "persons" liable under §1962(c) where the enterprise and the person are not distinct. *Brady v. Dairy Fresh Products Co.*, 974 F.2d 1149, 1153-54 (9th Cir. 1992) and cases cited therein. In the present case, the Sixth Circuit declined to follow this body of law, holding that it did not apply because MONY was distinct from the RICO enterprise (FIA) and because MONY benefited from the conduct of its employee Mr. Fletcher.[11] After reviewing the case law in this area, the Court of Appeals wrote:

> The rule to be drawn from these cases is that plaintiffs may not use RICO to impose liability vicariously on corporate "enterprises," because to do so would violate the distinctness requirement. No such prohibition, however, prevents the imposition of liability vicariously on corporate "persons" on account of the acts of their agents, particularly where the corporation benefitted by those acts. Such a prohibition, if it existed, would prevent corporate persons from ever being found liable under RICO, since corporate principals may act only through their agents. Such a rule would be manifestly contrary to the intent of Congress, and we decline to adopt it.

---

[11]Slip Opinion at A-29.

Slip Opinion at A-29. Petitioner respectfully urges that the Court of Appeals was incorrect in its analysis. The conduct of a corporation's business by its employees nearly always benefits the corporation. In enacting RICO §1962(c), Congress did not intend to impose vicarious liability on corporate employers, whose liability is amply established by §1962(a) and (b) of the act. Congress intended merely to provide a cause of action against the operators or managers of organizations infiltrated by organized crime. *Reves v. Ernst & Young*, 113 S.Ct. 1163, 1171-72 (1993). It was error for the Sixth Circuit to rule in the present case that MONY is liable under RICO §1962(c) as the corporate employer of Donald Fletcher solely because MONY received some benefits from his activities. Under the *Reves* case, actual operation or management of the illegal enterprise had to be found.

C. If Fletcher Insurance Associates was a separate and distinct enterprise, MONY did not operate or participate in the management of that enterprise so as to be liable under RICO §1962(c).

Finally, petitioner submits that if the Sixth Circuit Court of Appeals was correct in holding that Fletcher Insurance Associates was a sufficiently separate and distinct enterprise, then it erred in its application of the "operation or management" test set forth in *Reves v. Ernest & Young*, 113 S.Ct. 1163 (1993). Under that test, to conduct or participate, directly or indirectly in the conduct of the enterprise's affairs, one must participate in the operation or management of the enterprise itself. *Id.*, 113 S.Ct. at 1173.

The evidence at trial of this action showed that Fletcher Insurance Associates was an insurance group run by Donald Fletcher at the time it was selling MONY life insurance policies through MONY agents such as Evelyn Johnson. Although Mr. Fletcher and Mrs. Johnson were both agents of MONY, the evidence was undisputed that MONY instructed them not to prepare tax returns or to link tax preparation assistance with the purchase of life insurance. Mr. Fletcher operated and managed Fletcher Insurance Associates as an enterprise which facilitated the sale of life insurance policies.

Mr. Fletcher's and the agents' activities in rendering tax advice were clearly outside the scope of their authority as MONY agents. MONY should not have been held responsible for the conduct of this enterprise, where the acts were illegal and by definition not within the scope of its agents' authority. To hold otherwise would be to impute *criminal* acts upon a corporate employer.

The only other evidence found by the Court of Appeals to support the jury's verdict of direct liability under RICO §1962(c) was MONY's continuing to allow Mr. Fletcher and his colleagues to carry on with their sales techniques. The Court of Appeals felt that this passive inaction, with knowledge that wrong was being done, was sufficient to meet the *Reves* standard.[12] Such a finding, however, runs contrary to what this Court evidently had in mind in articulating the *Reves* standard, which requires active direction and management of the illegal enterprise as a prerequisite for RICO liability. The Sixth Circuit erred in failing to apply the *Reves* standard.

D. Conclusion: This Court should resolve the split between the Courts of Appeals as to when a corporate person is separate and distinct from the enterprise for RICO purposes.

The extent to which a corporation is exposed to a RICO treble-damage claim is an issue of paramount concern to the business community of this nation, and particularly to the life insurance industry which operates in many cases through a network of agents. The Court of Appeals erred in holding MONY liable under RICO §1962(c) for the conduct of its own employees and agents. The decision below adopts the minority rule amongst the circuit courts that under RICO §1962(c) a corporation is separate and distinct from an enterprise by reason of its independent legal existence and therefore may be held liable for the conduct of its agents and

---

[12]Slip Opinion at A-30.

affiliates. The Court of Appeals failed properly to apply the operation or management test of *Reves v. Ernst & Young, supra.* The Supreme Court should take jurisdiction of this appeal to correct this error and to settle the law amongst the courts of appeals as to when a corporate "person" is separate and distinct from the "enterprise" under RICO §1962(c).

II. A federal court in diversity jurisdiction should construe a state-created fee-shifting statute as it believes the highest state court would construe it in the present case.

In the present case, the District Court awarded attorneys fees to plaintiffs under both RICO (18 U.S.C. §1964(c)) and CSPA (Ohio Rev. Code §1345.09(F)) computing a lodestar amount of $531,569.84.[13] It then multiplied this figure by an enhancement factor of 1.75 due to (1) the impact of the size of the case on plaintiff's attorneys' small firm and (2) the contingent fee nature of the case. The total fee award of $930,247.22 was then apportioned between the defendants.[14] In making the award, the District Court did not address the issue of whether use of the enhancement multiplier was proper under state law (CSPA).

On appeal, the Sixth Circuit held that use of the enhancement multiplier for calculating the award under RICO was unreasonable, following *City of Burlington v. Dague*, 112 S.Ct. 2638 (1992). It reasoned that both the contingency nature of the case and the effect of the case on a small firm were factors already reflected in the

---

[13]To arrive at this amount, the District Court took the lodestar figure sought by plaintiffs and reduced it for (1) time spent on a related case; (2) time on matters not related to the present litigation; (3) conflicting time records and inadequate documentation; (4) duplication; and (5) an agreed reduction. Order of August 10, 1990, pp. A-101-105 of Appendix.

[14]Order of August 10, 1990, pp. A-109-110 of Appendix.

lodestar figure.[15] However, it affirmed the attorneys fee award under Ohio's CSPA.

Overlooking the fact that the District Court made no analysis of whether an enhancement multiplier was authorized under CSPA,[16] the Court of Appeals reviewed "the District Court's interpretation of the CSPA fee-shifting provision *de novo*."[17] Under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), as interpreted by *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941), it then looked for guidance to the most recent decision of the Ohio Supreme Court construing the statute, *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 569 N.E.2d 464 (1991) (Appendix at A-117). Resisting the urge to infer that the Ohio Supreme Court's past reliance on current federal law interpreting "reasonable attorneys' fee" would cause it to disallow use of an enhancement multiplier under CSPA, the Court of Appeals held that the *Bittner* decision required affirmance of the District Court's award so enhanced.

The Court of Appeals was wrong to follow its own interpretation of the *Bittner* case, rather than to predict how the present case would be decided in the state court system. *See Meredith v. Winter Haven*, 320 U.S. 228, 238 (1943). *Bittner* does not address the issue of fee enhancement directly. It speaks only of *modifying* the lodestar attorney fee figure by examining certain designated factors in accordance with *Hensley v. Eckerhart*, 461 U.S. 424 (1983), which it cites several times.

The intermediate Ohio courts of appeals have interpreted the *Bittner* decision to evidence a policy of following the principles of

---

[15]Slip Opinion at A-33-34.

[16]Order of August 10, 1990, contains no discussion of this issue.

[17]Slip Opinion at A-35.

U.S. Supreme Court decisions in arriving at attorney fee awards. *Hall v. Lacheta*, 1992 Ohio App. Lexis 5945 at *6 (5th Dist.Ct.App. 1992) (see Appendix at A-146); *Freeman v. Crown City Mining, Inc.*, 1993 Ohio App. Lexis 5062 at *20-*23 (4th Dist.Ct.App. 1993) (see Appendix at A-137-139). In the latter case, the intermediate court of appeals reversed the trial court on the use of a fee enhancement multiplier of 1.5, citing *Bittner* and *City of Burlington* and stating that the factors relied on by the trial court to enhance the fee award were already subsumed in the computation of the lodestar figure. 1993 Ohio App. Lexis 5062 at *23. In the present case, the Court of Appeals likewise ruled that the trial court's factors favoring enhancement under RICO were already reflected in the lodestar figure.[18] However, it somehow read *Bittner* to say that, for purposes of a CSPA fee award, these same factors justified use of a multiplier and that the total fees awarded were not impermissibly high.[19]

The Court of Appeals erred in reading the *Bittner* case as a controlling decision on the use of a fee-enhancing multiplier, a point not even discussed in that case. It further erred in failing to recognize that, to construe the fee-shifting provisions of CSPA, the Ohio Supreme Court would follow U.S. Supreme Court precedents to determine what fee is a reasonable one.[20]

---

[18]Slip Opinion at A-33-34.

[19]*Id.* at A-36.

[20]The Court of Appeals also failed to note that the *Bittner* case limits the award of attorneys fees to the time spent pursuing the CSPA claim. 58 Ohio St.3d at 145. The Court of Appeals failed to apply this limitation and awarded fees for the time spent pursuing all claims below. The result is that the attorney fee award affirmed by the Court of Appeals is far greater than what the District Court would have awarded had it made the award solely on the basis of CSPA.

The effect of the Court of Appeals' holding is to create two systems of justice for Ohio CSPA litigants. In the state court system, successful plaintiffs under the Ohio CSPA cannot recover enhanced attorney fees. *Freeman v. Crown City Mining, Inc., supra.* In the federal system, successful CSPA litigants can ask for and receive attorneys fee awards which are 75% greater, even though no Ohio Supreme Court decision has *ever* authorized such a multiplier.

This case presents to this Court the opportunity to settle an important issue pertaining to the determination of state law by federal courts sitting in diversity cases. In accordance with the holdings of this Court, lower courts should be instructed to determine issues of state law as they believe the highest court of the state would determine such issues, and not necessarily as the outdated dicta of past state court decisions would seem to decide them. By doing so, this Court will put the lower federal courts on equal terms with the lower state courts, searching for answers to state law questions based on what is most reasonable given state and federal precedent in the area, rather than construing existing state law precedent with blinders in place as to analogous federal law.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Sixth Circuit.

OF COUNSEL:

Anthony F. Recine, Esq.
1740 Broadway
New York, New York 10019
(212) 708-2200

Respectfully submitted,

STEPHEN L. BLACK
Graydon, Head & Ritchey
1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202
(513) 629-2723

Counsel for Petitioner

APPENDIX

Statutes

18 USC §1961:

§1961. Definitions

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia),

section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic, (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date

of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this

chapter or the investigative power of such department or agency otherwise conferred by law.

18 USC §1962:

§1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or

indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 USC §1964:

§1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential

allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Ohio Revised Code §1345.09:

§1345.09 Private remedies.

For a violation of Chapter 1345, of the Revised Code, a consumer has a cause of action and is entitled to relief as follows:

(A) Where the violation was an act prohibited by section 1345.02 or 1345.03 of the Revised Code, the consumer may, in an individual action, rescind the transaction or recover his damages.

(B) Where the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345.02 or 1345.03 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code, the consumer may rescind the transaction or recover, but not in a class action, three times the amount of his actual damages or two hundred dollars, whichever is greater or recover damages or other appropriate relief in a class action under Civil Rule 23, as amended.

(C) In any action for rescission, revocation of the consumer transaction must occur within a reasonable time after the consumer discovers or should have discovered the ground for it and before any substantial change in condition of the subject of the consumer transaction.

(D) Any consumer may seek a declaratory judgment, an injunction, or other appropriate relief against an act or practice that violates this chapter.

(E) When a consumer commences an individual action for a declaratory judgment or an injunction or a class action under this section, the clerk of court shall immediately mail a copy of the complaint to the attorney general. Upon timely application, the attorney general may be permitted to intervene in any private action or appeal pending under this section. When a judgment under this section becomes final, the clerk of court shall mail a copy of the judgment including supporting opinions to the attorney general for inclusion in the public file maintained under division (A)(3) of section 1345.05 of the Revised Code.

(F) The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if either of the following apply:

(1) The consumer complaining of the act or practice that violated this chapter has brought or maintained an action that is groundless, and the consumer filed or maintained the action in bad faith;

(2) The supplier has knowingly committed an act or practice that violates this chapter.

Nos. 90-3560/3561/3587/3878/3879/3881

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EMMETT R. DAVIS, et al.,
Plaintiffs-Appellees,
Cross-Appellants (90-3587/3881),
v.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (90-3560/3879); TRANS WORLD ASSURANCE COMPANY (90-3561/3878),
Defendants-Appellants,
Cross-Appellees,

DONALD S. FLETCHER; FLETCHER INSURANCE ASSOCIATES,
Defendants.

ON APPEAL from the United States District Court for the Southern District of Ohio

Decided and Filed September 21, 1993

Before: KENNEDY and GUY, Circuit Judges; and ENGEL, Senior Circuit Judge.

ENGEL, Senior Circuit Judge, delivered the opinion of the court in Parts I, II(A)(1), II(A)(2)(a), II(B), II(C), II(E)(2)(b), II(F), and III, in which KENNEDY and GUY, Circuit Judges, joined, and a dissenting opinion in Parts II(A)(2)(b), II(D), and II(E). KENNEDY, Circuit Judge (pp. 40-42), with whom Judge GUY concurs, delivered the opinion of the court with respect to the issues discussed in Parts II(A)(2)(b), II(D), II(E)(1) and II(E)(2)(a) of Judge ENGEL's opinion.

ENGEL, Senior Circuit Judge. Two life insurance companies--The Mutual Life Insurance Company of New York ("MONY") and Trans World Assurance Company ("TWA")--appeal from a jury verdict finding each liable for common law fraud, breach of fiduciary duty, breach of contract, and violations of the Ohio Consumer Sales Practices Act ("CSPA"), OHIO REV. CODE ANN. § 1345. In addition, MONY appeals the jury's finding that it was liable under the federal Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 to 1968, and both insurance companies appeal the district judge's award of attorney's fees. Finally, in a cross-appeal, Emmett R. Davis, one of the 29 individual plaintiffs below, offers four grounds to challenge the district court's award of damages.[1] For the following reasons, we affirm in part and reverse in part.

I.

This controversy arises out of the highly effective--albeit fraudulent--method by which Donald S. Fletcher sold life insurance policies. This is not the first time this court has reviewed an action arising out of Mr. Fletcher's scheme. *See Hofstetter v. Fletcher*, 905 F.2d 897 (6th Cir. 1988).

---

[1]Plaintiffs concede that, as Davis is the only cross-appellant named in the notice of appeal, he is the only cross-appellant whose claims are properly before this court. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988); *Jones v. Cassens Transport*, 982 F.2d 983, 984 (6th Cir. 1993).

In 1980, after four years of remarkably successful sales as an agent for New York Life Insurance Company (not a party to this action), Fletcher and his associates began selling policies for MONY. Three years later, he dissociated himself from MONY and began to sell insurance for TWA. The 29 plaintiffs each purchased MONY or TWA policies through Fletcher's operation in Ohio. In *Hofstetter*, we summarized Fletcher's "fraudulent sales tactic to sell life insurance policies:"

> [Fletcher] travelled throughout the country selling life insurance by emphasizing tax advantages. According to Fletcher, potential investors could drastically reduce and even eliminate their federal income tax liability by purchasing a life insurance policy in conjunction with the formation of a home-based business. Fletcher informed investors that they could write off almost all of their household expenses and attribute them to deductible business expenses. Fletcher also promised to assist the investors in the filing of their annual income tax forms [and to provide tax audit protection]. In order to participate in this tax/insurance program, the investor was required to purchase life insurance policies from Fletcher by paying annual premiums equal to one-half of the client's income tax for the previous year. The client was also required to become involved in a home-based business and to invest the equivalent of the other half of the preceding year's tax payment in the home-based business.

Id. at 900. Fletcher then prepared federal withholding (W-4) forms for his clients listing enough exemptions to reduce to zero the taxes withheld from their paychecks. He also arranged for the automatic withdrawal from their checking accounts of amounts equal to half the sums that had been withheld previously. These monies were used to pay the required insurance premiums. Fletcher and his associates then prepared his clients' federal tax returns, which claimed such liberal deductions for "business

expenses" (which were, in fact, largely personal expenses) that virtually no tax was owed. Fletcher further promised his clients that, should the IRS audit any of their tax returns, he would provide "audit protection" or "prepaid legal care." Through this scheme, Fletcher sold to numerous investors, including the plaintiffs, MONY policies from 1980 until 1983, and TWA policies from 1983 until 1985.

Eventually, the scheme unraveled. The IRS audited each plaintiff's tax return and discovered that, relying on astounding deductions for home-based businesses, the plaintiffs had underpaid their federal income tax for several years. The IRS, determining that the deductions were mostly invalid, assessed hundreds of thousands of dollars in additional taxes, penalties, and interest. Fletcher and his associates repeatedly assured the plaintiffs that the IRS would eventually drop the audits. The IRS, of course, persisted and enforced its assessments.

Seeking to recover damages compensating them for these unexpected IRS assessments, the plaintiffs brought this action alleging that they were bilked by Fletcher's confidence game. The complaint listed several causes of action--including RICO violations predicated on fraud, and several Ohio common law and statutory violations--and named four defendants: Fletcher, his insurance agency, known as Fletcher Insurance Associates ("FIA"), and the two appellant insurance companies, MONY and TWA. After a trial, a jury found all four defendants liable under each state law claim. Each defendant was found liable for common law fraud; breach of its fiduciary duty to the plaintiffs; breach of its contract to help the plaintiffs avoid income tax liability by legal means; and for committing unfair, deceptive and unconscionable acts in violation of the Ohio CSPA. In addition, the jury found that Fletcher and MONY, but not TWA, had violated RICO, 18 U.S.C. § 1962(c), and it found that Fletcher and FIA had engaged in a common law conspiracy. Based on the jury's findings, the district

court awarded the plaintiffs $3,587,274 in damages. The court adjudged each defendant jointly and severally liable for certain portions of the judgment, and apportioned liability for the remainder. Finally, the district court, finding authority in both RICO and the Ohio CSPA, awarded the plaintiffs $951,307.72 in attorneys' fees and expenses.

After the jury announced its verdict, MONY and TWA moved for judgment notwithstanding the verdict and for a new trial. The district court issued an order denying these motions, and each insurance company now appeals that order, along with the judgment and the court's Order Awarding Attorneys' Fees. In addition, one plaintiff, Emmett R. Davis, brings a cross-appeal. Neither Donald S. Fletcher nor FIA is a party to this appeal.

II.

A. State Law Claims

At trial, each defendant insurance company asserted its immunity from liability arising from Donald Fletcher's tax preparation activities. Fletcher, they argued, was authorized only to sell life insurance, and they bore no responsibility for unauthorized activities such as tax preparation. Unpersuaded, the jury found each company vicariously liable for common law fraud, breach of contract, breach of fiduciary duty, and violations of the Ohio CSPA--all in connection with Fletcher's tax and insurance program. On appeal, both TWA and MONY challenge those findings. Their arguments, which largely overlap, are essentially two-fold: First, they argue that the district court erred by improperly instructing the jury regarding a principal's liability for its agents' conduct, and that the court compounded its error by refusing to furnish the jury with a requested instruction regarding the law of independent contractors. Second, MONY and TWA assert that the district court's misstatement of agency law was prejudicial because the plaintiffs presented evidence insufficient to support the jury's

finding that Fletcher and his associates acted with MONY's or TWA's express, implied, or apparent authority when they prepared the fraudulent tax returns.

1. Jury Instructions

Where an appellant challenges jury instructions, we reverse only where the instructions, *considered as a whole*, are confusing, misleading, or prejudicial. *Leila Hospital and Health Center v. Xonics Medical Systems, Inc.*, 948 F.2d 271, 277 (6th Cir. 1991). A simple reading of the challenged instructions demonstrates that none of these conditions obtains. Rather than reading the instructions as a whole, the appellants object primarily to one sentence, namely, the court's instruction, with regard to the state law claims, that "[a]n insurance company which fails to adequately supervise its agents is directly liable for the agents' conduct." *Davis v. Mutual Life Insurance Company of New York*, No. C-1-87-0727, slip op. at 14 (Nov. 28, 1990) (Jury Instructions). That instruction, they argue, misstates Ohio law by failing to explain that an agent's unlawful conduct binds his principal only if performed *within the scope of the agent's authority*, suggesting instead that each insurance company is directly liable for *any and all* of Donald Fletcher's conduct. Indeed, as MONY and TWA argue, that sentence, abstracted from the whole, fails to explain that vicarious liability attaches only to acts that an agent performs within the scope of his authority. Read *in toto*, however, the instructions explicitly emphasize that crucial qualification. The challenged instruction, entitled "Claim Against the Insurance Companies," for example, provides in pertinent part:

> The acts of the [sic] Donald Fletcher, Evelyn Johnson, or other insurance agents are binding upon MONY and Trans World, as the case may be, *only if their acts were done within the scope of their express, implied, or apparent authority*. An insurance company which fails to properly

> supervise its agents is directly liable for the agents' conduct.
>
> I instruct you that a person who solicits an application for life insurance shall be considered the agent of the company that issues the policy and not the agent of the person insured.

Jury Instructions, slip op. at 14 (emphasis added). The next instruction, moreover, labeled "Liability of Principal for Acts of Agents - Scope of Authority," adds:

> The insurance companies are not bound by the acts of Donald Fletcher, Evelyn Johnson, or any other agents *if they acted beyond the limitations of their authority* and where the plaintiffs, relying on such acts, actually knew, or reasonably should have known, of the limitations or lack of authority to act on behalf of the insurance companies.
>
> An agent is acting within his "scope of authority" when such acts are done in the execution and furtherance of the principal's business and when his actions are expected in view of the duties authorized by the principal. A principal may not be held liable for the acts of its agents if the conduct in question has no relationship to the conduct of the principal's business or the conduct is so divergent that its very character severs the relationship between principal and agent.

Jury Instructions, slip op. at 16 (emphasis added). These instructions speak for themselves. They explicitly state that the insurance companies are not bound by an agent's act performed outside his authority, and we fail to see how any attentive juror would not understand that an agent's unlawful conduct binds his principal only if performed within the scope of his authority.

Nor are we persuaded by the appellants' second argument, which asserts that the district court erred by failing to give their requested instruction regarding the law of independent contractors. MONY and TWA requested an instruction entitled "Independent Contractor," which stated:

> The defendants, MONY and TWA, have claimed that Donald Fletcher was an independent contractor. An independent contractor has the right of control over the performance of his work and methods he uses. A life insurance agent who works in the capacity of an independent contractor carries on an independent business and agrees to perform a specific task without direction or control of the company who appointed him.

Instead, the court simply instructed the jury "that a person who solicits an application for life insurance shall be considered the agent of the company that issues the policy and not the agent of the person insured." Jury Instructions, slip op. at 14. That instruction is entirely consistent with Ohio statutory law, which provides that "[a] person who solicits insurance and procures the application therefor shall be considered as the agent of the party, company, or association thereafter issuing a policy upon such application or a renewal thereof." OHIO REV. CODE ANN. § 3929.27. *See also Damon's Missouri, Inc. v. Davis*, 590 N.E.2d 254, 257-58 (Ohio 1992) (Section 3929.27 "was designed to protect an insured by imputing conduct of a soliciting agent to the principal, the insurer."); *Saunders v. Allstate Ins. Co.*, 151 N.E.2d 1, 4 (Ohio 1958). Thus, while soliciting insurance for MONY, and for TWA thereafter, Fletcher was, as the district court informed the jury, an agent of the particular insurance company. The requested instruction would have been at best superfluous and at worst inconsistent with Ohio law. The critical questions were, as the court properly instructed the jury, whether Fletcher's unlawful conduct lay beyond the scope of his actual or apparent authority, and, if it did, whether the insurance companies

nonetheless ratified it. Accordingly, we find no error in the district court's refusal to instruct the jury as requested.

2. Sufficiency of the Evidence

(a) MONY

We next address MONY's challenge to the sufficiency of the evidence regarding its vicarious liability. MONY maintains that the plaintiffs presented no evidence at trial from which the jury could reasonably have concluded either that Fletcher or his associates were acting with its authority in preparing the plaintiffs' taxes, or that MONY ratified Fletcher's conduct.

We accord substantial deference to jury verdicts. We may neither weigh the evidence, pass on the credibility of the witnesses, nor substitute our judgment for that of the jury. *Marsh v. Arn*, 937 F.2d at 1060. Rather, we must view the evidence in the light most favorable to the appellees, drawing all reasonable inferences in their favor. *Id.*

Viewing the evidence in that light, we hold that the jury could reasonably conclude that Donald Fletcher remained within the scope of MONY's apparent authority when he offered to provide tax preparation services in conjunction with the sale of MONY life insurance policies, or that MONY bound itself by ratifying Fletcher's actions. As the district court properly instructed the jury, MONY was bound by the acts of Fletcher and his associates on the basis of apparent authority if the plaintiffs established that MONY's own conduct caused them reasonably to believe that MONY had authorized those agents to provide tax preparation services, and that the plaintiffs, in good faith, reasonably relied upon such authority. In addition, the district court properly instructed the jury that MONY was bound by its agents' acts even if such acts exceeded their actual or apparent authority, provided MONY *ratified* such actions. Ratification occurs where the principal receives and retains the benefits of a transaction with full

knowledge of all material facts. *Meyer v. Klensch*, 175 N.E.2d 870, 872 (Ohio App. 1961). MONY clearly received and retained the benefits of Fletcher's transactions with the plaintiffs each time it accepted a premium payment for a life insurance policy that Fletcher sold.

The plaintiffs, moreover, presented ample evidence that MONY management officials were fully aware of Fletcher's scheme. Fletcher's former partner, for example, testified that he and Fletcher described their tax and insurance program in detail at the outset of negotiations; that MONY officials attended tax seminars and listened to Fletcher's sales presentation, and were fully aware of all aspects of the operation. The plaintiffs also uncovered and introduced a virtual smoking gun: an internal report, prepared by a MONY attorney during negotiations between MONY and Fletcher, that described Fletcher's program in detail, calling it a "fast-track hustle." Although the report advised company officials that the tax and insurance program violated the law, the company appointed Fletcher as its insurance agent and Sales Manager. In addition, the plaintiffs presented evidence that MONY management personnel participated in training workshops for Fletcher's organization and recruited their own employees to work in the combined tax and insurance program. Furthermore, the evidence showed that MONY ignored warnings from its own corporate counsel that Fletcher was providing misleading tax information, warnings from its own agent that Fletcher's program involved "a lot of broken promises," and warnings from numerous policyholders that Fletcher was conducting a "con game" or "scam."

In short, the plaintiffs presented evidence from which the jury could reasonably conclude that MONY officials were fully aware of Fletcher's scheme as MONY reaped its benefits, thereby ratifying his conduct. Moreover, by presenting evidence that MONY held Fletcher out as Sales Manager and sponsored, promoted and participated in his seminars, the plaintiffs presented sufficient evidence to

support a finding that MONY bound itself by clothing Fletcher with apparent authority. We have little difficulty in affirming both the verdict and the district court's denial of MONY's motion for entry of judgment notwithstanding the verdict or for a new trial.

(b) TWA

In comparison to the evidence supporting MONY's vicarious liability, the evidence that *TWA* authorized or ratified Fletcher's tax preparation services in conjunction with sales of *its* life insurance is rather meager. Accordingly, a majority of this panel concludes that the district court's order denying TWA's motion for judgment notwithstanding the verdict be reversed. Nonetheless, because I believe that the evidence was sufficient to support the jury's verdict as to TWA, I dissent from that portion of the court's judgment.

Given the broad deference we must afford findings made by a properly instructed jury, I cannot join in a judgment holding, as a matter of law, that the evidence was insufficient. The plaintiffs presented evidence that TWA made Fletcher a "Marketing Director," reporting directly to TWA's president and vested with broad authority to recruit, train and supervise agents soliciting life insurance for TWA. I cannot say that no reasonable juror could base a finding of implied or apparent authority on that agreement.

There was also evidence supporting a finding that TWA bound itself by ratifying Fletcher's conduct. Fletcher was asked on cross-examination whether, during the course of his association with TWA, he had ever informed TWA of the method of selling insurance upon which he relied. When Fletcher denied that he had, he was successfully impeached, and he admitted that he had in fact informed TWA of his scheme.[2] The jury was, I think, entitled to believe this testimony, and to discredit the contradictory

[2]The examination occurred as follows:

statements made by TWA's witnesses, each of whom had an apparent bias.

Finally, the plaintiffs also presented evidence that TWA enjoyed an enormous boost in sales during Fletcher's tenure as a marketing director. Fletcher, who was associated with the company from late 1981 to late 1985, sold ordinary whole life insurance policies. Sales of this type of insurance skyrocketed during Fletcher's tenure at TWA.[3] Dramatic changes in income such as those apparently occasioned by Fletcher's association with the

---

[BY PLAINTIFFS' COUNSEL]

Q: Mr. Fletcher, I'm showing you some interrogatory answers that you answered and signed before a notary public and swore that they were true. You see that?

A: Yes.

Q: Do you remember giving them?

A: Oh, yes.

Q: The question No. 28 is: "While you were an insurance agent for Trans World Assurance Company, did you ever disclose to Trans World Assurance personnel that you were selling insurance through tax seminars? If so, to whom did you tell this? State the gist of what you said." And your answer is: "Yes, to Charles Royals. I mentioned to him that a tax lecture was being held and he might want to attend."

A: Uh-huh, yes. I believe your first question was when I first talked to them did I tell this to the president and my answer is no, this didn't come up till much later.

Q: But at some point while you were an agent for Trans World you did inform Mr. Royals you were selling through this tax seminar approach?

A: If my memory serves me, I mentioned the tax seminars, we were having one and he should try to fit it in and he didn't and that was the extent of the matter.

Davis v. Mutual Life Ins. Co. of N.Y., No. C-1-87-727 (S.D. Ohio Dec. 18, 1989), transcript of proceedings at 208.

[3]The following data, extracted from the record, reflects the dramatic improvement in TWA's overall financial picture apparently occasioned by Fletcher's presence. Under each year is set forth the total face value of all new whole life and endowment policies and the premium income from all newly issued ordinary and industrial life policies, both in thousands.

company were surely more than sufficient to put the company on notice that something was afoot. The incentive to look into Fletcher's General Managers' methods of salesmanship must have been especially strong since the changes wrought by those tactics impacted on the company in such a positive way. The jury was surely justified in believing that, under the circumstances, any reasonable person would have inquired into Fletcher's methods if for no other reason than to encourage their replication by other agents.

Charles Royals, the President of TWA, attempted to explain the rise and fall of the company's income with reference to factors unrelated to Fletcher's association. He claimed, for example, that the drop in income in the late 1980s was due, in part, to the company's decision to stop reinsuring a military benefit association's term life policies. Royals admitted that term life policies would not be included in the amount of whole life policies, which Fletcher was selling. Nonetheless, he explained, this fall in term life business would have indirectly affected the company's issuance of whole life policies because the two products were sold "in conjunction with" one another. Similarly unconvincing was Royals's attempt to explain the figures by reference to the company's sales of IRAs, which ceased in 1986, and which, Royals stated, were also sold as whole life insurance. Finally, Royals attempted to argue that the total face value of all policies issued by Fletcher and his organization--an amount that he conservatively estimated at $50 million--represented less than one per cent of all sales. When plaintiffs' counsel demanded to know how the company's annual reports could be interpreted so as to yield a figure for total sales in the range of $5 billion, Royals simply stated, "You don't understand the insurance business." These protestations, and others like them, were often evasive

1980	*1981*	*1982*	*1983*	*1984*	*1985*	*1986*	*1987*	*1988*
42,214	92,943	88,100	134,669	139,430	75,343	69,300	61,600	60,060
2,599	4,186	5,374	7,103	6,762	6,480	6,167	4,762	4,824

and incomprehensible, and the jury was entitled to disbelieve them. The jurors would have been fully justified in concluding that Fletcher's success could not have gone unnoticed by TWA officials. Reviewing the evidence in the light we must, and cognizant that we may not substitute our judgment for that of the jury, I cannot join in a judgment holding that no reasonable juror could find that TWA authorized, was aware of, or affirmatively condoned Fletcher's unlawful activities.

B. RICO

MONY asks this court to reverse the jury's finding that it is liable under section 1962(c) of RICO, which prohibits a person (real or corporate) from conducting or participating in the affairs of an enterprise through a pattern of racketeering activity. Specifically, RICO provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c).

The jury found that MONY, with Donald Fletcher, conducted or participated in the affairs of FIA or some other "association-in-fact" enterprise[4] through a pattern of racketeering activity, consisting of mail and wire fraud associated with inducing the plaintiffs to participate in

---

[4]RICO defines "enterprise" to include:

> Any individual, partnership, corporation, association, or other legal entity and any union or group of individuals associated in fact although not a legal entity.

18 U.S.C. § 1961(4).

Fletcher's tax and insurance scheme. MONY challenges that verdict on two grounds.

1. Distinctness

MONY's first argument rests on the relatively uncontroversial premise that, for purposes of section 1962(c), a corporation cannot be both the "enterprise" and the "person" conducting or participating in the affairs of that enterprise. *See, e.g., Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481, 1489 (6th Cir. 1989); *Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 29-30 (1st Cir. 1986). Under the "non-identity" or "distinctness" requirement, a corporation may not be liable under section 1962(c) for participating in the affairs of an enterprise that consists only of its own subdivisions, agents, or members. An organization cannot join with its own members to undertake regular corporate activity and thereby become an enterprise distinct from itself. *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). MONY argues that the jury verdict here violates this non-identity requirement because the verdict holds MONY liable for participating in the affairs of FIA, which, MONY maintains, is nothing but an association of MONY agents.

MONY's argument fails, however, because FIA need not be characterized merely as a division of MONY. We note at the outset that the district court explicitly instructed the jury that an individual or corporation cannot be both the "enterprise" and the "person" under RICO. At issue, therefore, is whether sufficient evidence supported the jury's finding that the enterprise was distinct from MONY. "In testing the sufficiency of the evidence, we may neither weigh the evidence, pass on the credibility of the witnesses nor substitute our judgment for that of the jury." *Marsh v. Arn*, 937 F.2d 1056, 1060 (6th Cir. 1991) (quotations omitted). The record is replete with evidence from which the jury could reasonably conclude that FIA was a distinct entity:

Fletcher's organization and program were firmly established by 1980 when, after New York Life severed ties, Fletcher approached MONY with his offer to sell its insurance through his organization. Since 1977, a previous incarnation of FIA, the Fletcher-McKelvie Group, sold policies for New York Life Insurance Company using the same tax and insurance scheme. Moreover, while Fletcher and his employees operated as sales agents for MONY, FIA conducted its own seminars for recruiting clients and for training agents, and entered into its own contracts with tax preparation services. In addition, FIA had its own board of directors, its own business cards, and its own office stationery. Finally, FIA remained intact after Fletcher dissociated from MONY in November 1983. The continuity of FIA apart from the operations of the several insurance companies whose policies FIA sold is compelling evidence of its independent existence as an "enterprise." In short, as we said of the precursor to FIA, in reference to its sales for New York Life:

> [I]t *was clearly an independent organization* through which defendants sold life insurance policies to scores of clients across the country by enticing them with false claims that the clients could reduce or even eliminate their federal income tax liability.

Hofstetter, 905 F.2d at 903 (emphasis added). In *Hofstetter*, we held that the Fletcher-McKelvie Group, "given these circumstances, . . . constituted a *separate* RICO enterprise under any recognized definition of the statutory term." *Id.* While *Hofstetter* does not control here, since the instant case presents a new question, it nonetheless informs our inquiry to determine whether reasonable jurors could find that the enterprise was distinct from the corporate insurance company. *Hofstetter* speaks to the patent autonomy of the Fletcher-McKelvie Group, which later evolved with little alteration into FIA. Nothing in the facts before us, including Donald Fletcher's agreement to sell only MONY life insurance

from June 1980 through November 1983, persuades us that the independence of FIA diminished to such an extent that the jury could reasonably conclude only that FIA was, during that interval, indistinguishable from MONY.

This analysis is unaffected by MONY's having acted through Fletcher. It might be argued that, since MONY's liability is predicated on acts of Fletcher, and since Fletcher could not have associated with FIA, MONY's liability must similarly be barred. This line of reasoning is flawed for two reasons. First, a RICO defendant's method of action is irrelevant. It matters not that MONY acted through an individual whose distinctness from the enterprise is open to question; what matters is that MONY itself and the enterprise are distinct. Second, and more important, even if the relevant inquiry were into the relationship between Fletcher and FIA, the finding of RICO liability could stand, for RICO contains no requirement that the person be removed from the enterprise. Although, as discussed above, RICO forbids the imposition of liability where the enterprise is nothing more than a subdivision or a part of the person, the requirement does not run the other way. Indeed, RICO requires that the person be employed by or associated with the enterprise. *Cf. McCullough v. Suter*, 757 F.2d 142 (7th Cir. 1985) (holding that a sole proprietor, as the person, may associate with the business, as the enterprise, as long as there are other employees).

2. Vicarious Liability

In its second argument challenging liability under RICO, MONY asserts that, as a matter of law, a corporate principal may not be vicariously liable for its agents' actions in violation of section 1962(c). We review this question of law *de novo*. *U.S. v. Breitkreutz*, 977 F.2d 214, 221 (6th Cir. 1992).

MONY overstates the law. This circuit has not yet considered whether section 1962(c) of RICO rules out vicarious liability for corporate defendants. Although

courts of appeals in four other circuits have addressed the question, the doctrine remains muddied. To argue that *respondeat superior* does not apply here, MONY relies principally on *Schofield v. First Commodity Corp.*, 793 F.2d 28, 32-33 (1st Cir. 1986), where the First Circuit refused to impute to a principal the RICO liability of its agents, reasoning that "the concept of vicarious liability is directly at odds with the Congressional intent behind section 1962(c)." Such broad language notwithstanding, the First Circuit's narrow description of the issue it decided in *Schofield*--namely, whether "a RICO 'enterprise' may . . . be held liable for civil damages under section 1962(c) either directly or under principles of *respondeat superior*," *id.* at 29--suggests a far narrower holding. So, too, does the court's rationale, which is firmly rooted in the non-identity requirement discussed above:

> Both the language of [section 1962(c)] and the articulated primary motivation behind RICO show that *Congress intended to separate the enterprise from the criminal "person" or "persons."* Indeed, there is unlikely to be a situation, in the absence of an express statement, in which Congress more clearly indicates that *respondeat superior* is contrary to its intent.

Id. at 32 (emphasis added). In short, *Schofield* seems intertwined with the widely-embraced principle that a corporation may not be named as both a defendant "party" and as the RICO "enterprise." Its holding that *respondeat superior* does not apply to violations of section 1962(c) by corporate agents, therefore, seems restricted to cases, like *Schofield*, where the corporate defendant and the

enterprise are indistinguishable.[5] Indeed, the First Circuit's only relevant gloss on *Schofield* cites that case for the proposition that "section 1962(c) does not recognize corporate liability *on the enterprise's part* under a theory of *respondeat superior*." *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 45 (1st Cir. 1991) (emphasis added). Thus, we do not find *Schofield* particularly instructive in the instant case, where the corporate defendant charged with vicarious liability is *separate from* the RICO "enterprise."

Three other circuits have, like the First Circuit, refused to impose vicarious liability under section 1962(c) of RICO, but we find their decisions no more germane. In *Luthi v. Tonka Corp.*, 815 F.2d 1229, 1230 (8th Cir. 1987), the Eighth Circuit refused, as a matter of law, to impute to the Tonka Corporation the alleged RICO violations of its chief financial officer. Citing *Schofield*, the court held that section 1962(c) does not permit vicarious liability, "particularly where the pleadings indicate that the principal was a victim of the individual's activities." *Id.* Here, the plaintiffs did not allege that Fletcher victimized MONY through his racketeering activity; instead, they alleged that MONY knowingly sponsored and *benefited* from the activity. *Luthi*, therefore, did not decide the question now before us.

---

[5]The court's conclusion lends additional support to this interpretation:

> [A]ppellant's argument is that corporations at least should be liable when they participate in causing the wrongdoing that RICO punishes. We concede the appeal of this argument, and wholeheartedly agree that corporations should not escape liability when their policies foster the racketeering activity that is at the heart of RICO's prohibitions. But . . . section 1962(c) poses a formidable barrier to holding the enterprise liable under that subsection. We think it inappropriate to use respondeat superior to accomplish indirectly what . . . the statute directly denies.

793 F.2d at 33 (emphasis added).

Similarly, the Seventh Circuit, explicitly following both *Luthi* and *Schofield*, has also "reject[ed] the doctrine of *respondeat superior* in civil RICO cases." *D & S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 968 (7th Cir), *cert. denied*, 486 U.S. 1061 (1988). Like *Luthi* and *Schofield*, however, *D & S Auto Parts* is largely inapposite because it, too, involved a corporation indistinguishable from the alleged RICO enterprise that neither benefited from nor participated in the criminal scheme. *Id.* at 966-67. Indeed, the rationale of the court, which noted that "some participation in the criminal scheme [is] a necessary element of liability for the corporate-enterprise," and that an "employer may be vicariously liable only for employee action taken . . . with intent to benefit the employer," *id.*, seems to permit liability in a case such as this one, where the corporate defendant was distinct from the enterprise and allegedly promoted the fraudulent scheme. *See also SK Hand Tool Corporation v. Dresser Industries, Inc.*, 852 F.2d 936, 941 (7th Cir. 1988), *cert. denied*, 492 U.S. 918 (1989) (holding that corporate defendant, as an "unwilling conduit," could not be held vicariously liable for acts of individual defendants); *Liquid Air Corporation v. Rogers*, 834 F.2d 1297, 1306-07 (7th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989) (holding that, where corporate defendant was victimized by acts of individual defendant, corporate defendant could not be vicariously liable if doing so would violate distinctness requirement).

Finally, the Ninth Circuit has recently reached the same conclusion. In *Brady v. Dairy Fresh Products Co.*, 974 F.2d 1149, 1154 (9th Cir. 1992), the court stated, in a well-reasoned opinion, that vicarious liability would not be imposed upon a corporate defendant if doing so would violate the distinctness requirement, or if the company was not benefitted by the acts of the individual defendant. Since imposing vicarious liability on MONY would not violate the distinctness requirement, and since MONY benefitted by Fletcher's conduct, this holding does not change our analysis.

Our decision on this issue also finds support from the Third Circuit, which finds vicarious liability under section 1962(c) to be "appropriate" in cases like this one, where the corporate principal is distinct from the RICO enterprise and "is alleged to have attempted to benefit from its employees' racketeering activity." *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1361-62 (3rd Cir. 1987).

The rule to be drawn from these cases is that plaintiffs may not use RICO to impose liability vicariously on corporate "enterprises," because to do so would violate the distinctness requirement. No such prohibition, however, prevents the imposition of liability vicariously on corporate "persons" on account of the acts of their agents, particularly where the corporation benefitted by those acts. Such a prohibition, if it existed, would prevent corporate persons from ever being found liable under RICO, since corporate principals may act only through their agents. Such a rule would be manifestly contrary to the intent of Congress, and we decline to adopt it.

Here, the plaintiffs sought to impose liability on MONY as a corporate "person." They also presented abundant evidence that MONY actively promoted and sponsored the scheme, and plainly benefitted from it through the resultant increase in its corporate income. Under these circumstances, we see no reason to disregard ordinary principles of *respondeat superior*. We therefore decline to invalidate the jury's finding that MONY was liable under section 1962(c) for its participation in Donald Fletcher's fraudulent scheme.

3. Control

Since oral argument in this case, the Supreme Court has spoken on a topic closely related to that of vicarious liability under RICO. In *Reves v. Ernst & Young*, 113 S. Ct. 1163 (1993), an accounting firm failed to present in the condensed version of financial statements information

suggesting that the audited business's primary asset might be grossly overvalued. The Court ruled that the accounting firm's involvement in the affairs of the business did not rise to the level at which RICO liability attached. The Court reasoned that, since RICO imposes liability only on those who "conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs," the statute's reach extended only to persons who had "some part in directing those affairs." *Id.* at 1170. Since the accounting firm's participation in the affairs of the business was tangential at best, the firm could not be held liable under RICO.

Although it is a close question, we believe that our analysis is unaffected by the Supreme Court's holding in *Reves*. The question is made difficult by virtue of MONY's participation in the affairs of FIA or some other association-in-fact having taken place largely through the acts of Fletcher. Nonetheless, we conclude that MONY exercised sufficient control over the affairs of the RICO enterprise to withstand scrutiny under the Supreme Court's new test.

First, there can be no question but that Fletcher himself exercised sufficient control over the affairs of the enterprise to meet the requirements of *Reves*. There is also little doubt that, under the circumstances of this case, Fletcher's acts can be attributed to MONY. Accordingly, we think it appropriate to attribute to MONY Fletcher's role within the RICO enterprise.

Additionally, we believe that MONY's participation in the affairs of FIA or some other association-in-fact was sufficiently extensive to meet the requirements of *Reves* even if we were to refuse to attribute to MONY Fletcher's control of the enterprise. As detailed below in section II(B)(2)(a), the evidence revealed that, even after MONY had received numerous warnings concerning FIA's fraudulent sales tactics, MONY continued to allow, if not actively encourage, Fletcher and his associates to carry on with their scheme. In light of this state of affairs, and of

the central role that MONY's life insurance policies played in Fletcher's scheme, we have little difficulty in ruling that MONY exercised sufficient control over the affairs of the RICO enterprise to withstand scrutiny under *Reves*.

For the foregoing reasons, we affirm both the jury's verdict finding MONY liable under RICO and the district court's order denying MONY's motion for judgment notwithstanding that verdict.

C. Attorneys' Fees.

Citing its authority under RICO and the Ohio CSPA, the district court awarded the plaintiffs $930,247 in attorney's fees. It arrived at that figure through a familiar two-step method. First, it calculated a "lodestar" figure of $531,569 by multiplying the number of hours reasonably expended on this litigation by a reasonable hourly rate. Second, because the plaintiffs hired their counsel on a contingency-fee basis and because this litigation had a great impact on the small practice of the plaintiffs' counsel, the district court then multiplied the $531,569 "lodestar" figure by 1.75 to arrive at the final award. On appeal, MONY argues (as does TWA) that the district court abused its discretion by enhancing the lodestar figure so dramatically.

Both RICO and the Ohio CSPA permit trial courts to award prevailing plaintiffs "a *reasonable* attorney's fee." 18 U.S.C. § 1964(c) (emphasis added); OHIO REV. CODE § 1345.09(F) (emphasis added). MONY argues that, by enhancing the lodestar figure by a factor of 1.75, the district court awarded fees not authorized under either statute because the award was *unreasonable*. We must decide, therefore, whether the enhanced award was "reasonable" under either RICO or the Ohio CSPA.

Without distinguishing between the two fee-shifting statutes, the district court offered two justifications for using a multiplier to calculate a "reasonable" fee. First, it

reasoned, enhancement was necessary to compensate for the contingency-fee arrangement between the plaintiffs and their counsel. Second, the court added, a multiplier was proper, given the large impact this litigation had upon the small practice of the plaintiffs' counsel.

1. MONY & TWA

(a) RICO

Though we cannot fault the district court, neither justification can support its use of a multiplier under RICO's fee-shifting provision. RICO permits a civil plaintiff to recover "the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c). The district court cited and followed *Fite v. First Tennessee Production Credit Ass'n.*, 861 F.2d 884 (6th Cir. 1988), in which our court relied on the same two justifications to affirm a fee award that enhanced the lodestar calculation by a multiplier of 1.75. *Id.* at 895 (holding that a "contingent fee arrangement justifies the use of a multiplier," and that "the fact that counsel worked in a two-person firm is relevant").

Recent Supreme Court authority, however, requires that we disavow our holding in *Fite*, and reverse the district court's use of a multiplier insofar as it rests on RICO's fee-shifting provision. In *City of Burlington v. Dague*, 112 S. Ct. 2638 (1992), the Court clarified its interpretation of the numerous federal fee-shifting statutes that authorize courts to award "reasonable" attorney fees to a prevailing party. Correcting a misunderstanding held by our court and many others in the wake of *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), the Supreme Court ruled "that enhancement for contingency is not permitted under the [typical federal] fee-shifting statutes." 112 S. Ct. at 2643.

Under that straightforward holding, section 1964(c) of RICO, which does not materially differ from the fee-shifting provision at issue in *City of Burlington* (section

7002(e) of the Solid Waste Disposal Act),[6] plainly does not permit a court to enhance an attorney's fees on account of contingency. *Cf. Wolfel v. Morris*, 972 F.2d 712, 720 (6th Cir. 1992) (reversing, on basis of *City of Burlington*, fee enhancement awarded under 42 U.S.C. § 1988); *Drennan v. General Motors Corp.*, 977 F.2d 246, 253 (6th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3717 (May 24, 1993) (extending *City of Burlington* to enhancement of fees awarded under ERISA, 29 U.S.C. § 1132(g)(1)).

City of Burlington similarly leads us to reject the enhancement of attorneys' fees on the grounds that the litigation in question impinges significantly on a small law practice. The Court noted that enhancement for contingency was inappropriate because it "would likely duplicate in substantial part factors already subsumed in the lodestar." 112 S. Ct. at 2641. The Court based this conclusion on the observation that the risk posed by contingent fee arrangements is largely a function of the merits of a claim and the difficulty of establishing those merits, and on the observation that the second factor will generally be reflected in the lodestar, "either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so." *Id.*

This same reasoning applies to enhancement based on the disproportionate effect that a piece of litigation has on a small law practice. The portion of a firm's work attributable to a single piece of litigation can be relevant only insofar as there exists a negative correlation between that figure and the firm's ability to take on additional clients. Since attention detracted from other matters is devoted to the matter at hand, this factor is already

---

[6]Indeed, the Court noted that the "language is similar to that of many other federal fee-shifting statutes," and that its "case law construing what is a 'reasonable' fee applies uniformly to all of them." 112 S. Ct. at 2641.

reflected in the lodestar in the number of hours expended.[7]

A further consideration suggests that the holding in *City of Burlington* may properly be extended to prohibit enhancement on grounds other than contingency. The Court noted that "the interest in ready administrability . . . and the related interest in avoiding burdensome satellite litigation . . . counsel strongly against adoption of contingency enhancement." *Id.* at 2643. So, too, do they counsel against enhancement based on many other factors. Ohio courts, for example, may currently select from a dizzying array of justifications for enhancement of a lodestar.[8] One may readily envision a scenario wherein, through a tortuous process of litigation, each of these

---

[7]It could be argued that enhancement based on impact is appropriate because the maintenance of comparatively large pieces of litigation prevents small firms from diversifying risk by taking on additional clients. This risk, however, is present only where fees are contingent, and so *City of Burlington* clearly prohibits enhancement based on such a consideration.

[8]Ohio courts may select a multiplier figure based on any consideration listed in the Model Code of Professional Responsibility as a basis for computing a reasonable fee. *Bittner v. Tri-County Toyota, Inc.*, 569 N.E.2d 464, 467 (Ohio 1991). As set forth in the Ohio Rules, these factors are:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> (5) The time limitations imposed by the client or by the circumstances.
>
> (6) The nature and length of the professional relationship with the client.
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> (8) Whether the fee is fixed or contingent.

factors is eventually brought under the rule of *City of Burlington*. In light of the Supreme Court's announcement that one of the desired attributes of the federal fee-shifting statutes is "ready administrability," we consider it appropriate to extend the rule of *City of Burlington* so as to prevent enhancement of lodestars on grounds of disproportionate effect.[9]

Accordingly, we hold that, insofar as *Fite* is inconsistent with *City of Burlington*, it no longer represents the law of this Circuit. Under RICO, a contingent fee arrangement does not justify the use of a multiplier, and it is irrelevant that prevailing counsel worked in a small firm. Insofar as the district court relied on RICO to issue its fee award, it abused its discretion.

(b) CSPA

That does not end our inquiry. The district court did not rely solely on RICO; it ordered MONY and TWA to pay attorneys' fees pursuant to Ohio's CSPA, which permits the court to "award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed . . . ." OHIO REV. CODE ANN. § 1345.09(F)(2). The United States Supreme Court's interpretation of federal fee-shifting statutes, of course, does not control our interpretation of that state statute. We must determine, therefore, whether the court's use of a 1.75 multiplier would, as MONY urges, be *unreasonable* under Ohio's construction of the CSPA.

We review the district court's interpretation of the CSPA fee-shifting provision *de novo*. *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1221 (1991). Under

---

DR 2-106.

[9]We note also that at least four Justices of the Supreme Court have concluded that, as a general rule, courts should not enhance lodestars by more than one third. *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 483 U.S. 711, 730 (1987) (plurality opinion of White, J.).

Ohio law, trial courts enjoy broad discretion in calculating the amount that is "reasonable" under section 1345.09(F)(2), though the Supreme Court of Ohio has announced guidelines:

> When awarding reasonable attorneys' fees pursuant to R.C. 1345.09(F)(2), the trial court should first calculate the number of hours reasonably expended on the case times an hourly fee, and then may modify that calculation by application of the factors listed in DR 2-106(B) . . . . All factors may not be applicable in all cases and the trial court has the discretion to determine which factors to apply, and in what manner that application will affect the initial calculation.

Bittner v. Tri-County Toyota, Inc., 569 N.E.2d 464, 467 (Ohio 1991). Unlike the generic federal fee-shifting statutes, section 1345.09(F)(2) permits a trial court to award fees based on the familiar "lodestar" figure *with an enhancement where payment is contingent on outcome and where the case precludes the attorney from accepting other cases. See* n.8, *supra*.

Concededly, the Ohio Supreme Court's 1991 interpretation of the term "reasonable attorneys' fee" in *Bittner* faithfully follows the United States Supreme Court's then extant interpretation of the term. *See, e.g.*, 569 N.E.2d at 466 (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)). Accordingly, one might infer from the Ohio court's reliance on current federal law a general policy of following federal law on this issue. *See Hall v. Lacheta*, No. 92AP020013, slip op. at 6, 1992 Ohio App. lexis 5945 (Nov. 19, 1992). Were we to do so, we could conclude that, were the supreme court of Ohio to revisit this issue, it would once again follow federal law and disallow enhancement of the type considered here.

We decline, however, to make such an inference. It is hornbook law that a federal court sitting in diversity must

apply state law "in accordance with the then controlling decision of the highest state court." *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941); *Monette v. AM-7-7 Baking Co.*, 929 F.2d 276, 280 (6th Cir. 1991). This rule applies unless the federal court is convinced by "persuasive data that the highest court of the state would decide otherwise." *New Hampshire Ins. Co. v. Viera*, 930 F.2d 696, 701 (9th Cir. 1991) (quoting *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940)). We cannot allow a propensity to speculate as to yet unarticulated law to allow us to indulge our own predisposition.

Here, the Ohio Supreme Court did not make sufficiently clear its intent consistently to pattern its decisions on this issue after those of the federal courts to persuade us to overturn its most recent decision on the issue. *Cf. In re Ryan*, 851 F.2d 502 (1st Cir. 1988) (holding that lower court erred in predicting that state court would reverse controlling decision, unrevisited since 1869); *Awrey v. Progressive Cas. Ins. Co.*, 728 F.2d 352 (6th Cir. 1984), *cert. denied*, 474 U.S. 920 (1985) (holding that lower court did not err in refusing to attempt to predict course of state court decisions). And, there is no suggestion in recent opinions of the Ohio courts of appeals awarding fees under the CSPA that *Bittner* is no longer good law. *See, e.g., Wolfe v. Cooper*, No. 62372, slip op. at 12, 1993 Ohio App. lexis 2611 (May 27, 1993). Accordingly, while we prefer the federal rule, and can rationally speculate that Ohio's supreme court may reexamine Ohio fee-shifting provisions in the wake of *City of Burlington*, such speculation provides a wholly inadequate basis for disregarding such a clear pronouncement by the state's highest court. While the enhanced award is impermissible under RICO, and startlingly high, it is not "so high . . . as to shock the conscience." Accordingly, *Bittner* commands that we not interfere. 569 N.E.2d at 467.

2. Davis

In his cross-appeal, plaintiff Emmett R. Davis also appeals the fee award. Davis argues that the district court erred by failing to adopt the jury's recommendation that it award the plaintiffs $129,510 in attorney's fees. The recommendation, Davis argues, required the court to add that sum to its $930,247 award. As *Bittner* makes clear, however, the court itself determines the award. The district court's broad discretion certainly encompasses the discretion to disregard the jury's recommended award.

For the foregoing reasons, we hold that the district court's award of attorney's fees was "unreasonable" under RICO, but "reasonable" under the CSPA. Accordingly, the court affirms as to MONY the district court's Order Awarding Attorney's Fees. Parenthetically, and in dissent, since I would affirm the district court's rulings holding TWA liable, I would affirm the award of fees against TWA as well.

D. Evidentiary Issues

TWA appeals two evidentiary rulings made by the district court. Because it is the judgment of a majority of this court that the district court's denial of TWA's motion for judgment notwithstanding the verdict be reversed, the court need not address TWA's remaining claims of error. Because I would affirm as to TWA, however, I will address TWA's arguments.

1. Fifth Amendment Privilege

TWA's first objection centers on appearances made by two non-party witnesses who had indicated before trial that, if compelled to appear, they would refuse to answer any questions regarding Donald Fletcher's tax and insurance program. The two witnesses, Fletcher's former employees Sandra Goldstick and Evelyn Johnson, announced before trial that they intended to invoke their Fifth Amendment privilege against self-incrimination. TWA and MONY, fearful that the jury would construe

repeated invocations of the privilege as admissions of guilt, which the jury would impute to them, moved the district court to bar Goldstick's and Johnson's testimony. Citing Federal Rule of Evidence 403,[10] the insurance companies argued that exclusion was appropriate because the minimal probative value of such testimony could not counterbalance its highly prejudicial, confusing, and misleading effect. The district court denied the motions, and, at trial, each witness indeed repeatedly invoked her privilege. TWA appeals the district court's order denying its motion *in limine*.

A district court's decision that the probative value of a particular witness's appearance outweighs its prejudicial effect is, of course, a matter of discretion, and we may reverse only if that discretion is abused. *U.S. v. Kelley*, 849 F.2d 999, 1003 (6th Cir.), *cert. denied*, 488 U.S. 982 (1988). Moreover, we must examine the witness's testimony in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect. *Id.* Reviewing Goldstick's and Johnson's testimony in that light, I find a permissible exercise of discretion.

"In order to exclude evidence under Rule 403, the evidence must be more than damaging; it must be unfairly prejudicial." *U.S. v. Rey*, 923 F.2d 1217, 1222 (6th Cir. 1991). Unfair prejudice, moreover, "means an undue tendency to suggest a decision on an improper basis." *Id.* TWA argues that any inference that the jury could draw from Johnson's and Goldstick's invocations of the privilege would constitute just such an improper basis.

---

[10] Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403.

Thus, they argue, the evidence had no probative value whatsoever and a strong tendency to suggest a decision on an improper basis. I disagree.

In a civil case, a party's invocation of the privilege against compulsory self-incrimination gives rise to a legitimate inference that the witness was engaged in criminal activity. *Baxter v. Palmigiano*, 425 U.S. 308 (1976); J. H. WIGMORE, 8 EVIDENCE IN TRIALS AT COMMON LAW § 2272, at 439 (McNaughten rev. 1961 & Supp. 1991); *See also Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 522 (8th Cir.) *cert. denied*, 469 U.S. 1072 (1984). As Justice Brandeis observed, "[s]ilence is often evidence of the most persuasive character." *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-54 (1923). I see no reason to distinguish a party's invocation of the privilege from that of a non-party witness, since the inference to be drawn in either case runs against the defendant. Moreover, our court, in appropriate circumstances, has "permitted the practice of calling a witness who will assert his fifth amendment privilege" in a *criminal* trial. *U.S. v. Vandetti*, 623 F.2d 1144, 1145 (6th Cir. 1980). In criminal proceedings, of course, the aims that underlie the privilege apply with more force than they do in civil proceedings. Thus, our holding in *Vandetti* applies with greater force here.

In this case, Johnson's refusal to answer questions had great probative value. There was a great deal of evidence that she was a central figure in Fletcher's organization. She had worked for Fletcher since the 1970s. She not only actually sold life insurance to each plaintiff on Fletcher's behalf, but she was also the individual who referred the plaintiffs to Fletcher's tax preparation services. Although Goldstick was more peripherally involved in Fletcher's operation, she was another employee repeatedly mentioned during the trial. The refusal of these two witnesses to answer any questions about actions they had taken on behalf of FIA support a rational inference that they had participated in activity that they feared would subject them to criminal liability. *See*

Cerro Gordo Charity v. Fireman's Fund American National Ins. Co., 819 F.2d 1471, 1480-82 (8th Cir. 1987).

Furthermore, where the witness invoking the privilege is a former employee of the civil defendant, and where the questions that the witness refuses to answer concern the witness's activities undertaken on behalf of the employer and during the period of employment, it is proper to allow the jury to impute the witness's guilt to the defendant. *Cerro Gordo Charity*, 819 F.2d at 1481; *RAD Services, Inc. v. Aetna Casualty and Surety Co.*, 808 F.2d 271 (3rd Cir. 1986); *Brink's Inc. v City of New York*, 717 F.2d 700 (2d Cir. 1983). This is particularly true where, as here, other evidence implicates the defendant in the activities of the witness claiming the privilege. *RAD Services*, 808 F.2d at 277. Thus, both the inference and the imputation of guilt were proper.

For the foregoing reasons, I would hold that the district court's denial of TWA's and MONY's motion to exclude the testimony of Sandra Goldstick and Evelyn Johnson was not an abuse of discretion.

2. Hearsay

TWA raises a second evidentiary claim. It argues that the district court erred when it prohibited TWA's president, Charles Royals, from testifying about a conversation that he had with Evelyn Johnson. At trial, TWA made no proffer regarding the content of this proposed hearsay testimony. A week after the district court entered its judgment, however, Royals stated in an affidavit that, two months before the trial, Johnson, upset and crying, called him to discuss this litigation, and said that she feared losing her home, which was subject to a judgment lien resulting from an earlier lawsuit involving the same tax and insurance scheme. Johnson purportedly informed Royals that the plaintiffs' counsel, who was also counsel for the plaintiffs in the earlier case, had threatened to execute the lien unless she paid him $10,000 and testified on the plaintiffs' behalf in this case. TWA

argues that Johnson's hearsay statements were admissible under Rule of Evidence 803(3), which permits hearsay statements regarding a declarant's then existing emotion or state of mind. This claim merits little comment. Even if plaintiffs' counsel's statements to Johnson fall outside the hearsay rule because they were offered to show that a threat had been made, and even if Johnson's statements to Royals fall within the exception for statements regarding state of mind because Johnson purportedly stated that she was fearful, the district court was nonetheless entitled to exclude the statements under Rule 403. Again, Rule 403 permits the court to exclude relevant evidence when its prejudicial effect substantially outweighs its probative value. Clearly, these volatile hearsay statements, charging that the plaintiffs' counsel extorted a witness, were manifestly prejudicial. Furthermore, because they were not relevant to any issue in the case, their probative value was nil.[11] The district court was well within its discretion to exclude the statements.

E. Apportionment of Damages.

Neither side is satisfied with the manner in which the district court apportioned damages. The court adjudged all four defendants jointly and severally liable for all damages resulting from their breaches of fiduciary duty, but apportioned liability among the defendants for all other damages and attorneys' fees. In the principal appeal, TWA contends that the district court erred by imposing joint liability for the breach of fiduciary duty damages. In the cross-appeal, Davis counters that the court erred by failing to hold all defendants jointly and severally liable for all damages and fees.

---

[11] TWA argued below that the testimony was offered to establish Johnson's distraught state of mind when she took the stand. Since, however, Johnson testified to little other than her name, her credibility was not at issue, and her state of mind was therefore irrelevant. It is more likely that TWA offered the testimony in order to establish that plaintiffs' counsel had violated the rules of professional conduct. Such an allegation, however, has no place in a civil trial.

1. TWA

Because it is the judgment of a majority of this court that TWA be absolved of all liability, the court need not address TWA's argument that the district court erred in holding it jointly liable for the damages stemming from the defendants' breaches of fiduciary duty. Because I would affirm as to TWA, however, I address that claim of error.

The decision whether to hold two defendants jointly liable turns on the independence of the defendants and on the injuries they caused. Under Ohio law, a judgment against an independent tortfeasor "can extend only to the injuries proximately caused by that tortfeasor." *Jones v. Meinking*, 531 N.E.2d 728, 730 (Ohio App. 1987). In other words, "a joint judgment against two or more tortfeasors is proper only where, because of their relationship, concert of action, or independent but concurrent action, each is vicariously responsible for the wrongful acts of the other or others to the extent of the entire damage done." *Farmers State Bank & Trust Co. v. Mikesell*, 554 N.E.2d 900, 914 (Ohio App. 1988) (quotation omitted).

Here, the two defendant insurance companies did not interact with one another. Fletcher sold life insurance for MONY between 1980 and 1983, and did not begin to sell TWA policies until after he dissociated from MONY in November 1983. Hence there is no relationship, concert of action, or even concurrent action to support a theory of vicarious responsibility between MONY and TWA. Moreover, there is no real overlap between the injuries attributable to MONY and those attributable to TWA. Apart from injuries resulting from the breaches of fiduciary duties, the plaintiffs' injuries consist simply of their federal tax liabilities and penalties, as assessed by the IRS. These injuries are readily divisible according to the sale of a specific carrier's insurance. Hence, TWA did not proximately cause and is not otherwise responsible for the distinct injuries that Fletcher caused while selling

policies for MONY. Accordingly, I would hold that the district court erred in holding TWA jointly liable to MONY policyholders for damages arising out of the defendants' breaches of fiduciary duty.

The same reasoning would seem to apply to the district court's decision to hold MONY liable to TWA policyholders. MONY has failed, however, to raise such an argument. Nevertheless, to avoid confusion on remand, I am authorized to state that the entire panel of the court agrees that MONY may not be held liable to TWA policyholders.

2. Davis

Davis objects to the district court's refusal to hold all defendants jointly liable for all damages. Specifically, Davis argues that, under Ohio law, the district court erred in apportioning between TWA and MONY damages arising out of the defendants' fraud, breaches of contract, and violations of the Ohio CSPA. Additionally, Davis argues that, under federal law, the district court erred in refusing to hold MONY jointly liable to TWA policyholders for damages arising out of Fletcher's violations of RICO. Davis's claims regarding apportionment may thus be divided into two types: (a) claims that TWA should be liable to MONY policyholders for violations of state law; and (b) claims that MONY should be liable to TWA policyholders for violations of state and federal law.

(a) TWA

In light of the majority's decision to absolve TWA of all liability, the court need not address Davis's argument that TWA should be jointly liable to MONY policyholders for the defendants' violations of state law. Because I would affirm as to TWA, however, I address Davis's claims in this regard.

Davis's claims may be disposed of simply by reference to my discussion of TWA's argument in section II(E)(1), *supra*. The injuries suffered by MONY policyholders and those suffered by TWA policyholders are completely separate, and state law prohibits the imposition of joint liability in such circumstances. Thus, I would hold that the district court did not err in refusing to hold TWA jointly liable for the injuries to MONY policyholders.

(b) MONY

Davis's argument that MONY should be held jointly liable to TWA policyholders is as easily dismissed. As noted above, *see* n.1, *supra*, Davis is the only plaintiff before this court on appeal. Davis was a MONY policyholder, and never had any contact, direct or indirect, with TWA. Thus, Davis has no standing to raise claims on behalf of TWA policyholders. Accordingly, we do not address this claim of error.

F. Attorney Misconduct

In his cross-appeal, Emmett R. Davis appeals the district court's order denying plaintiffs' motion for a new trial retrying only the issue of punitive damages. Misconduct on the part of TWA's and MONY's trial counsel, Davis maintains, created unfair prejudice and passion against the plaintiffs and their counsel on the issue of punitive damages. Specifically, Davis points to potentially prejudicial remarks, made during closing arguments by counsel for MONY and TWA, accusing plaintiffs' counsel of gross ethical violations and subornation of perjury. The district court denied the motion because, given the jury's generous damage award, it could not conclude that there was a reasonable probability that any attorney misconduct unduly influenced the jury's verdict. Accordingly, the court concluded, no new trial was warranted. For largely the same reasons, we affirm.

We afford considerable deference to a district court's determination whether attorney misconduct warrants a new trial. "[T]he determination of the extent of permissible comment and argument by counsel rests primarily in the judicial discretion of the lower court." *City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749, 756 (6th Cir. 1980); *Twachtman v. Connelly*, 106 F.2d 501, 509 (6th Cir. 1939). Nonetheless, where there is a reasonable probability that a counsel's improper comment on extraneous matters unduly influences a jury verdict, the verdict should be set aside. *City of Cleveland*, 624 F.2d at 756. To determine whether such a probability exists, we examine the totality of the circumstances, including the verdict itself. *Id.*

In the instant case, the plaintiffs enjoyed a highly favorable verdict; the jury awarded the 29 plaintiffs $1,054,075 in compensatory damages and recommended another $338,039 in punitive damages. In light of these awards, we are unable to see sufficient indication that attorney misconduct resulted in prejudice against the plaintiffs. Like the district court, we find it unlikely that inappropriate comment would adversely affect the plaintiffs with respect to the punitive damage award but not the remainder of the judgment, in which they fared extraordinarily well. We hold therefore that the district court did not abuse its broad discretion to determine whether attorney misconduct requires a retrial, and affirm its order denying the plaintiffs' motion for a new trial on punitive damages.

III.

For the foregoing reasons, and for the reasons separately expressed by Judge Kennedy and concurred in by Judge Guy, we AFFIRM the district court's denial of MONY's motions for judgment notwithstanding the verdict and for a new trial, but we REVERSE the district court's denial of TWA's motion for judgment notwithstanding the verdict. We AFFIRM the district court's order awarding attorney's fees against MONY, but

VACATE that order as it relates to TWA. We AFFIRM the district court's order denying plaintiffs' motion for a new trial on the issue of punitive damages, and we VACATE the district court's order apportioning damages. We REMAND for entry of judgment in favor of TWA and for reapportionment of damages and attorney fees against MONY consistent with this opinion.

CORNELIA G. KENNEDY, Circuit Judge, with whom Judge GUY joins, concurring in part and dissenting in part.

We concur in all of Judge Engel's opinion except for parts II(A)(2)(b) and II(D), the portions upholding the verdict against TWA.

Fletcher was a general agent of TWA to sell life insurance. As such, he was an independent contractor. He was "free to exercise independent judgments as to the time and manner in which he [would] perform the services." General Agent's Contract. He was to solicit and produce applications for life insurance and annuities. The contract expressly provided that he could not alter or waive any terms of the policies he sold or make representations not strictly in accordance with policies. He was not "[t]o incur any expense or obligation of any kind or nature in the name of or on behalf of the Company, without first obtaining the express written authority of the Company in each case, . . ." or "[t]o do or perform any act or thing other than is expressly granted herein." Each policy of insurance was sold on the basis of an application for insurance sent to TWA and accepted by it. The policy clearly said that the contract with TWA was contained in the policy and the application, and that they were the entire contract and could only be modified in writing signed by an officer of the company. Thus, the insureds were on notice that Fletcher's authority was limited.

There is no evidence that TWA ever authorized any of its agents to become involved in income tax preparation.

The marketing director agreement merely gave Fletcher an override on sales by agents he brought along with him to TWA. It did not purport to make him an employee of TWA but maintained the independent contractor relationship. Both Fletcher and the agents, from whom he received an override, also wrote insurance for other insurance companies during the time they wrote for TWA.

Judge Engel acknowledges that the evidence against TWA is slight. He infers, however, that the jury could infer that TWA knew of Fletcher and his sub-agents' fraudulent tax scheme. Fletcher denied ever telling TWA of his scheme. Judge Engel states that the testimony of Fletcher, quoted on page 12 of his opinion, is sufficient for the jury to find that Fletcher was impeached when he said that he did not inform TWA of his scheme. I disagree. The fact that Fletcher, in a conversation, told a TWA executive that a tax lecture was being held and he might like to attend gave no notice to TWA of the tax scheme here. The executive did not attend and the subject was not discussed again. Judge Engel also would find knowledge from the large increases in sales. The increases might have been sufficient to cause TWA to inquire how these insurance agents did so well. But there is no evidence that it did inquire and direct evidence that it did not. If we were dealing with a negligence standard, I could agree that further inquiry might be required. But the standard here is what TWA knew, not what it should have investigated. The evidence was insufficient to permit the jury to find ratification under the court's instruction.

The jury instruction on ratification stated:

> The insurance companies may be bound by the acts of their agents, Donald Fletcher, Evelyn Johnson and others, even if such acts exceeded their actual or apparent authority, if the insurance companies ratified such actions. A principal may ratify the actions of his agent by receiving and retaining the benefits of the transaction, or by mere silence where his silence tends to mislead, when done with full knowledge of all material facts.
>
> The ratification by the principal of an unauthorized action may be shown by the conduct of the principal done with full knowledge of all material facts.

There was no basis for the jury to find that TWA had ratified Fletcher's tax fraud with full knowledge of all material facts.

Because we find the evidence insufficient with respect to TWA, we set aside the verdict and dismiss the action against TWA.

(THIS PAGE INTENTIONALLY LEFT BLANK)

Case No: 90-3560: 90-3561: 90-3587:
90-3878: 90-3879: 90-3881

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

[Filed October 19, 1993]

EMMETT R. DAVIS, et al.,

Plaintiff - Appellee Cross-Appellant

v.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK;

Defendant - Appellant Cross-Appellee

TRANS WORLD ASSURANCE COMPANY; DONALD S. FLETCHER; FLETCHER INSURANCE ASSOCIATES

Defendants

BEFORE: KENNEDY and GUY, Circuit Judges; and ENGEL, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed by the appellee-cross-appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN/fi
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EMMETT R. DAVIS, et al.,

Plaintiffs,

NO: C-1-87-727

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a/k/a MONY, et al.,

JUDGMENT

[Filed March 8, 1990]

Defendants.

We have carefully reviewed the jury's answers to the interrogatories, and the jury's accompanying message,[1] as well as the parties' proposed judgments and memoranda in support thereof (see docs. 153, 155, 156), and the Court hereby makes the following observations regarding them before entering judgment for the plaintiffs against the defendants:

1) Each of the plaintiffs entered into lawful contracts with the defendants to avoid their income tax liability by legal means. They were not contracts to unlawfully evade taxes.

[1]The jury attached the following message to its answers to the Interrogatories:

> It is the intent of the Jury to award to the plaintiffs enough money to "get them out of the hole," and to make them come out even with the IRS; and to have each of them "start from scratch."
>
> The Jury

2) Each of the defendants, Mutual of New York (MONY), Trans World Assurance Company (TWA), Donald S. Fletcher (Fletcher), and Fletcher Insurance Associates (FIA) breached its contracts with the plaintiffs and each is separately liable to the plaintiffs for the damage caused thereby. See question 2(d), page three of the Interrogatories. Damages shall be awarded as apportioned by the jury in its answer to question 2(e) on page 4 of the Interrogatories.

3) The defendants MONY, TWA, Fletcher and FIA committed common law fraud against all of the plaintiffs. Because the jury found that damages as to TWA and MONY could be apportioned, there is no indivisible injury as to these defendants; however Defendants Donald S. Fletcher and FIA are jointly and severally liable for all of the plaintiffs' damages because the jury found liability as to Fletcher and FIA, but could not apportion damages, thereby indicating one indivisible injury caused by the unlawful conduct of Fletcher and FIA.

4) Similarly, defendants MONY, TWA, Fletcher, and FIA committed unfair and deceptive acts and unconscionable acts prohibited by the Ohio Consumer Sales Practice Act, §§ 1345 O.R.C., et seq. As with plaintiffs' fraud claims, the jury indicated that damages could be apportioned between defendants TWA and MONY but that no such allocation of damages could be made against defendants Fletcher and FIA. Thus, Fletcher and FIA are jointly and severally liable for all of the damages caused by such violations of the Ohio Consumer Sales Practices Act and MONY and TWA are liable for damages as apportioned by the jury.

5) Defendants MONY and Fletcher violated 18 United States Code § 1962(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO), and are jointly and severally liable to plaintiffs for the trebled damages pursuant to 18 U.S.C. § 1964, except as explained in paragraph 8 below.

Defendant TWA did not violate 18 U.S.C. § 1962(c).

6) None of the defendants conspired to violate RICO, 18 U.S.C. §1962(d).

7) Defendants MONY, TWA, Fletcher, and FIA each violated their fiduciary obligation to each of the plaintiffs. The damages incurred by the plaintiffs as a result of the defendants' violation of their fiduciary obligations to the plaintiffs are joint and several because the jury determined that each defendant violated its fiduciary duty to each plaintiff and because of the vicarious liability of MONY and TWA for the actions of Fletcher and FIA.

8) Because the jury found that neither MONY nor TWA engaged in a common law conspiracy, although it found Fletcher and FIA did so, MONY is not liable for damages plaintiffs incurred as a result of TWA's violations of law, nor is TWA liable for damages plaintiffs incurred as a result of MONY's violations of law. Therefore, the damages assessed against MONY in common law fraud and RICO and the violations of the Ohio Consumer Sales Practice Act will be limited to those plaintiffs and in the proportions found by the jury in answer to the interrogatory question 2(e) on page four. Similarly, the damages assessed against TWA for common law fraud and violations of the Ohio Consumer Sales Practice Act will be limited to those plaintiffs and in the proportions found by the jury in its answer to interrogatory question 2(e) on page four thereof. See Chart A attached for apportionment of compensatory damages.

Thus, the portion of RICO damages for which Fletcher and MONY are jointly and severally liable is determined by trebling MONY's apportionment of the compensatory damages as set forth in the jury's answers to question 2(e) on page 4; Donald S. Fletcher is separately liable for the trebled RICO damages which were not apportioned against MONY.

9) None of the plaintiffs' claims in this case were barred by any applicable statutes of limitations.

Accordingly, the Court in recognition of the jury's apportionment of damages where appropriate -- for breach of contract, fraud, violations of the Ohio Consumer Sales Practices Act, and RICO -- and in consideration of the jury's message accompanying its answers to the interrogatories, does hereby enter judgment as follows.

JUDGMENT

Judgment is hereby entered in this case in favor of the defendants and against Plaintiffs on Plaintiffs' claims under RICO 18 U.S.C. §1962(d).

Judgment is hereby entered in this case in favor of the plaintiffs and against all defendants in the amount of THREE MILLION, FIVE HUNDRED AND EIGHTY-SEVEN THOUSAND, TWO HUNDRED AND SIXTY-FOUR DOLLARS AND ZERO CENTS ($3,587,264.00). The damages incurred by each plaintiff for the various violations of law and as to each defendant are set forth in the charts appended to this Order. Chart A delineates the apportionment of damages against each defendant per plaintiff for breach of contract, fraud, and violation of Ohio Consumer Sales Practices Act, referred to collectively hereafter as "compensatory damages." Chart B depicts the total judgment per plaintiff, identifying the portions attributable to compensatory damages, RICO, fiduciary duty, and punitive damage awards as well as the portions of the damage awards which are subject to joint and several liability. Charts C through F represent the judgments against each defendant.

Therefore, it is hereby Ordered that judgment is entered in favor of plaintiffs and against defendant Mutual of New York, part of which judgment is joint and several against the other defendants specified as follows: Total judgment - TWO MILLION, TWO HUNDRED AND EIGHTY THOUSAND, THIRTY-FOUR DOLLARS AND SIXTY-SIX CENTS ($2,280,034.66), of which MONY is jointly and severally liable with all defendants for

EIGHTY-SEVEN THOUSAND DOLLARS AND ZERO CENTS ($87,000.00) (fiduciary duty) and is jointly and severally liable with Donald S. Fletcher for TWO MILLION, ONE HUNDRED SIXTY-FOUR THOUSAND, EIGHT HUNDRED NINETY-FOUR DOLLARS AND SIXTY-SIX CENTS ($2,164,894.66) (RICO). See Chart C.

It is hereby Ordered that judgment is entered in favor of plaintiffs and against defendant Trans World Assurance, part of which judgment is joint and several against the other defendants specified as follows: Total judgment - FOUR HUNDRED THIRTY-NINE THOUSAND, SEVENTY-TWO DOLLARS AND FIFTY CENTS ($439,072.50), of which TWA is jointly and severally liable with all defendants for EIGHTY-SEVEN THOUSAND DOLLARS AND ZERO CENTS ($87,000.00) (fiduciary duty). See Chart D.

It is hereby Ordered that judgment is entered in favor of plaintiffs and against defendant Donald S. Fletcher, part of which judgment is joint and several against the other defendants specified as follows: Total judgment - THREE MILLION, THREE HUNDRED NINETY-FOUR THOUSAND, TWO HUNDRED AND TWENTY-FIVE DOLLARS AND ZERO CENTS ($3,394,225.00), of which Fletcher is jointly and severally liable with all defendants for EIGHTY-SEVEN THOUSAND DOLLARS AND ZERO CENTS ($87,000.00) (fiduciary duty) and he is jointly and severally liable with MONY for TWO MILLION, ONE HUNDRED SIXTY-FOUR THOUSAND, EIGHT HUNDRED NINETY-FOUR DOLLARS AND SIXTY-SIX CENTS ($2,164,894.66) (RICO). See Chart E.

It is hereby Ordered that judgment is entered in favor of plaintiffs and against defendant Fletcher Insurance Associates, part of which judgment is joint and several against the other defendants specified as follows: Total judgment - ONE MILLION, TWO HUNDRED EIGHTY-SIX THOUSAND, SEVENTY-FOUR DOLLARS AND ZERO CENTS ($1,286,074.00), of which FIA is jointly and severally liable with all defendants for EIGHTY-SEVEN

THOUSAND DOLLARS AND ZERO CENTS ($87,000.00) (fiduciary duty).

It is further Ordered that to prevent the plaintiffs from recovering their enture damages more than once, each plaintiff's total recovery from all defendants is limited to his RICO damages, plus $3,000.00 each in fiduciary damages, plus the sum of all punitive damages awarded to each plaintiff against all defendants.

The Court recognizes that the jury indicated the attorney fees to be awarded the plaintiffs, however, the Court will determine the attorney's fees and costs to be awarded the plaintiffs from the defendants, to which they are entitled under RICO and the Ohio Consumer Sales Act pursuant to appropriate post-trial motions. The Court will, of course, be mindful of the jury recommendation, in determining an award of attorney's fees and costs.

SO ORDERED.

/s/ S. ARTHUR SPIEGEL
United States District Judge

Chart A

APPORTIONMENT OF COMPENSATORY DAMAGES

	DEFENDANTS			
PLAINTIFFS	MONY	TWA	FLETCHER/FIA[1]	TOTAL
A. Adler	$ 25,680.50	$ 0.00	$ 25,680.50	$ 25,680.50
A. Adler	25,680.50	0.00	25,680.50	25,680.50
J. Abney	59,314.20	44,745.80	104,060.00	104,060.00
A. Clark	47,487.50	0.00	47,487.50	47,487.50
M. Clark	47,487.50	0.00	47,487.50	47,487.50
E. Davis	66,587.00	0.00	66,587.00	66,587.00
M. Davis	66,587.00	0.00	66,587.00	66,587.00
D. Griffey	31,559.00	31,559.00	63,118.00	63,118.00
S. Griffey	31,559.00	31,559.00	63,118.00	63,118.00
Sh. Johnson	0.00	5,025.00	5,025.00	5,025.00
Sa. Johnson	6,104.25	6,104.25	12,208.50	12,208.50
W. Johnson	6,104.25	6,104.25	12,208.50	12,208.50
G. Lamb	20,764.80	31,147.20	51,912.00	51,912.00
J. Lamb	20,764.80	31,147.20	51,912.00	51,912.00
B. Lenard	8,769.00	8,769.00	17,538.00	17,538.00

Chart A
APPORTIONMENT OF COMPENSATORY DAMAGES
(continued)

PLAINTIFFS	MONY	TWA	FLETCHER/FIA[1]	TOTAL
C. Lenard	8,769.00	8,769.00	17,538.00	17,538.00
H. Lenard	19,613.75	19,613.75	39,227.50	39,227.50
R. Lenard	19,613.75	19,613.75	39,227.50	39,227.50
D. Lenard	0.00	10,101.00	10,101.00	10,101.00
C. Page	0.00	20,793.00	20,793.00	20,793.00
W. Page	0.00	20,793.00	20,793.00	20,793.00
S. Poast	16,179.50	0.00	16,179.50	16,179.50
T. Poast	16,179.50	0.00	16,179.50	16,179.50
E. Smith	6,099.87	18,299.63	24,399.50	24,399.50
M. Smith	6,099.87	18,299.63	24,399.50	24,399.50
Rob. Storms	55,642.50	0.00	55,642.50	55,642.50
Ros. Storms	55,642.50	0.00	55,642.50	55,642.50

Chart A
APPORTIONMENT OF COMPENSATORY DAMAGES
(continued)

PLAINTIFFS	MONY	TWA	FLETCHER/FIA[1]	TOTAL
L. Terrell	26,671.00	0.00	26,671.00	26,671.00
W. Terrell	26,671.00	0.00	26,671.00	26,671.00
TOTAL	$721,631.54	$332,443.46	$1,054,075.00	$1,054,075.00

1. Fletcher and Fletcher Insurance Associates are jointly and severally liable for all damages enumerated herein.

Chart B

JUDGMENT AGAINST ALL DEFENDANTS

Allocation of Damages

PLAINTIFF	TOTAL	COMPENSATORY	RICO[1]	FIDUCIARY[2]	PUNITIVE[3]	JT. & SEV. PORTION[4]
G. Adler	$ 90,041.50	$ 25,680.50	$ 77,041.50	$ 3,000.00	$ 10,000.00	$ 80,041.50
H. Adler	90,041.50	25,680.50	77,041.50	3,000.00	10,000.00	80,041.50
J. Abney	328,200.00	104,060.00	312,180.00	3,000.00	13,020.00	180,942.60
A. Clark	155,934.50	47,487.50	142,462.50	3,000.00	10,472.00	145,962.50
M. Clark	155,934.50	47,487.50	142,462.50	3,000.00	10,472.00	145,962.50
E. Davis	215,721.00	66,587.00	199,761.00	3,000.00	12,960.00	202,761.00
M. Davis	215,721.00	66,587.00	199,761.00	3,000.00	12,960.00	202,761.00
D. Griffey	206,648.50	63,118.00	189,354.00	3,000.00	14,294.50	97,677.00
S. Griffey	206,648.50	63,118.00	189,354.00	3,000.00	14,294.50	97,677.00
Sh. Johnson	28,475.00	5,025.00	15,075.00	3,000.00	10,400.00	3,000.00
Sa. Johnson	50,575.50	12,208.50	36,625.50	3,000.00	10,950.00	21,312.00
W. Johnson	50,575.50	12,208.50	36,625.50	3,000.00	10,950.00	21,312.00
G. Lamb	171,337.00	51,912.00	155,736.00	3,000.00	12,601.00	65,294.40
J. Lamb	171,337.00	51,912.00	155,736.00	3,000.00	12,601.00	65,294.40

Chart B

JUDGMENT AGAINST ALL DEFENDANTS

(Continued)

PLAINTIFF	TOTAL	COMPENSATORY	RICO[1]	FIDUCIARY[2]	PUNITIVE[3]	JT. & SEV. PORTION[4]
B. Lenard	67,149.00	17,538.00	52,614.00	3,000.00	11,535.00	29,307.00
C. Lenard	67,149.00	17,538.00	52,614.00	3,000.00	11,535.00	29,307.00
H. Lenard	132,667.50	39,227.50	117,682.50	3,000.00	11,985.00	61,841.25
R. Lenard	132,667.50	39,227.50	117,682.50	3,000.00	11,985.00	61,841.25
D. Lenard	45,066.00	10,101.00	30,303.00	3,000.00	11,763.00	3,000.00
C. Page	76,447.00	20,793.00	62,379.00	3,000.00	11,068.00	3,000.00
W. Page	76,447.00	20,793.00	62,379.00	3,000.00	11,068.00	3,000.00
S. Poast	62,106.50	16,179.50	48,538.50	3,000.00	10,568.00	51,538.50
T. Poast	62,106.50	16,179.50	48,538.50	3,000.00	10,568.00	51,538.50
E. Smith	87,809.00	24,399.50	73,198.50	3,000.00	11,610.50	21,299.63
M. Smith	87,809.00	24,399.50	73,198.50	3,000.00	11,610.50	21,299.63
Rob. Storms	182,264.50	55,642.50	166,927.50	3,000.00	12,337.00	169,927.50
Ros. Storms	182,264.50	55,642.50	166,927.50	3,000.00	12,337.00	169,927.50

Chart B

JUDGMENT AGAINST ALL DEFENDANTS

(Continued)

PLAINTIFF	TOTAL	COMPENSATORY	RICO[1]	FIDUCIARY[2]	PUNITIVE[3]	JT. & SEV. PORTION[4]
L. Terrell	94,060.00	26,671.00	80,013.00	3,000.00	11,047.00	83,013.00
W. Terrell	94,060.00	26,671.00	80,013.00	3,000.00	11,047.00	83,013.00
TOTAL	$3,587,264.00	$1,054,075.00	$3,162,225.00	$87,000.00	$338,039.00	$2,251,894.66

1. Total RICO damages. See Charts C and E for apportionment of RICO damages.
2. Fiduciary duty damages as assessed by the jury, page 16 of the Interrogatories.
3. Punitive damages as assessed by the jury, page 21 of the Interrogatories.
4. Sum of total Fiduciary duty damages per plaintiff and RICO damages as apportioned to MONY.

Chart C

MUTUAL OF NEW YORK JUDGMENT

PLAINTIFF	JUDGMENT[1]	PORTION JOINT & SEVERAL[2]	JOINT & SEVERAL AGAINST WHOM
G. Adler	$ 80,041.50	$ 80,041.50	$ 3,000.00 All;[3] 77,041.50 Fletcher[4]
H. Adler	80,041.50	80,041.50	3,000.00 All; 77,041.50 Fletcher
J. Abney	182,664.00	180,942.60	3,000.00 All; 177,942.60 Fletcher
A. Clark	145,934.50	145,462.50	3,000.00 All 142,462.50 Fletcher
M. Clark	145,934.50	145,462.50	3,000.00 All 142,462.50 Fletcher

Chart C
MUTUAL OF NEW YORK JUDGMENT
(Continued)

PLAINTIFF	JUDGMENT[1]	PORTION JOINT & SEVERAL[2]	JOINT & SEVERAL AGAINST WHOM
E. Davis	205,721.00	202,761.00	3,000.00 All; 199,761.00 Fletcher
M. Davis	205,721.00	202,761.00	3,000.00 All; 199,761.00 Fletcher
D. Griffey	99,824.25	97,677.00	3,000.00 All; 94,677.00 Fletcher
S. Griffey	99,824.25	97,677.00	3,000.00 All; 94,677.00 Fletcher
Sh. Johnson	3,000.00	3,000.00	3,000.00 All
Sa. Johnson	21,787.75	21,312.75	3,000.00 All; 18,312.75 Fletcher

Chart C
MUTUAL OF NEW YORK JUDGMENT
(Continued)

PLAINTIFF	JUDGMENT[1]	PORTION JOINT & SEVERAL[2]	JOINT & SEVERAL AGAINST WHOM
W. Johnson	21,787.75	21,312.75	3,000.00 All; 18,312.75 Fletcher
G. Lamb	66,334.80	65,294.40	3,000.00 All; 62,294.40 Fletcher
J. Lamb	66,334.80	65,294.40	3,000.00 All; 62,294.40 Fletcher
B. Lenard	30,074.50	29,307.00	3,000.00 All; 26,307.00 Fletcher
C. Lenard	30,074.50	29,307.00	3,000.00 All; 26,307.00 Fletcher

Chart C
MUTUAL OF NEW YORK JUDGMENT
(Continued)

PLAINTIFF	JUDGMENT[1]	PORTION JOINT & SEVERAL[2]	JOINT & SEVERAL AGAINST WHOM
H. Lenard	62,833.75	61,841.25	3,000.00 All; 58,841.25 Fletcher
R. Lenard	62,833.75	61,841.25	3,000.00 All; 58,841.25 Fletcher
D. Lenard	3,000.00	3,000.00	3,000.00 All
C. Page	3,000.00	3,000.00	3,000.00 All
W. Page	3,000.00	3,000.00	3,000.00 All
S. Poast	52,106.50	51,538.50	3,000.00 All; 48,538.50 Fletcher

Chart C
MUTUAL OF NEW YORK JUDGMENT
(Continued)

PLAINTIFF	JUDGMENT[1]	PORTION JOINT & SEVERAL[2]	JOINT & SEVERAL AGAINST WHOM
T. Poast	52,106.50	51,538.50	3,000.00 All; 48,538.50 Fletcher
E. Smith	21,702.26	21,299.63	3,000.00 All; 18,299.63
M. Smith	21,702.26	21,299.63	3,000.00 All; 18,299.63
Rob. Storms	172,264.50	169,927.50	3,000.00 All; 166,927.00 Fletcher
Ros. Storms	172,264.50	169,927.50	3,000.00 All; 166,927.00 Fletcher

Chart C
MUTUAL OF NEW YORK JUDGMENT
(Continued)

PLAINTIFF	JUDGMENT[1]	PORTION JOINT & SEVERAL[2]	JOINT & SEVERAL AGAINST WHOM
L. Terrell	84,060.00	83,013.00	3,000.00 All; 80,013.00 Fletcher
W. Terrell	84,060.00	83,013.00	3,000.00 All; 80,013.00 Fletcher
TOTAL	$2,280,034.66	$2,251,894.66	$ 87,000.00 All; $2,164,894.66 Fletcher

1. Judgment for each plaintiff calculated by adding the RICO trebled damages apportioned to MONY plus breach of fiduciary duty damages ($3,000.00 per plaintiff) plus the punitive damages assigned to MONY for each plaintiff.

2. Portion of damages which are subject to joint and several liability is the sum of MONY's RICO damages for breach of fiduciary duty.

3. Denotes fiduciary duty portion.

4. Denotes MONY's RICO portion.

Chart D

TRANS WORLD ASSURANCE JUDGMENT

PLAINTIFF	JUDGMENT[1]	PORTION JOINT & SEVERAL[2]	JOINT & SEVERAL AGAINST WHOM
G. Adler	$ 3,000.00	$ 3,000.00	All Defendants
H. Adler	3,000.00	3,000.00	All Defendants
J. Abney	48,774.00	3,000.00	All Defendants
A. Clark	3,000.00	3,000.00	All Defendants
M. Clark	3,000.00	3,000.00	All Defendants
E. Davis	3,000.00	3,000.00	All Defendants
M. Davis	3,000.00	3,000.00	All Defendants
D. Griffey	36,706.25	3,000.00	All Defendants
S. Griffey	36,706.25	3,000.00	All Defendants
Sh. Johnson	8,425.00	3,000.00	All Defendants
Sa. Johnson	9,579.25	3,000.00	All Defendants
W. Johnson	9,579.25	3,000.00	All Defendants
G. Lamb	35,707.80	3,000.00	All Defendants
J. Lamb	35,707.80	3,000.00	All Defendants

Chart D

TRANS WORLD ASSURANCE JUDGMENT

(Continued)

PLAINTIFF	JUDGMENT[1]	PORTION JOINT & SEVERAL[2]	JOINT & SEVERAL AGAINST WHOM
B. Lenard	12,536.50	3,000.00	All Defendants
C. Lenard	12,536.50	3,000.00	All Defendants
H. Lenard	23,606.25	3,000.00	All Defendants
R. Lenard	23,606.25	3,000.00	All Defendants
D. Lenard	14,864.00	3,000.00	All Defendants
C. Page	24,861.00	3,000.00	All Defendants
W. Page	24,861.00	3,000.00	All Defendants
S. Poast	3,000.00	3,000.00	All Defendants
T. Poast	3,000.00	3,000.00	All Defendants
E. Smith	22,507.50	3,000.00	All Defendants
M. Smith	22,507.00	3,000.00	All Defendants
Rob. Storms	3,000.00	3,000.00	All Defendants
Ros. Storms	3,000.00	3,000.00	All Defendants

Chart D
TRANS WORLD ASSURANCE JUDGMENT
(Continued)

PLAINTIFF	JUDGMENT[1]	PORTION JOINT & SEVERAL[2]	JOINT & SEVERAL AGAINST WHOM
L. Terrell	3,000.00	3,000.00	All Defendants
W. Terrell	3,000.00	3,000.00	All Defendants
TOTAL	$439,072.50	$87,000.00	All Defendants

1. Judgment for each plaintiff calculated by adding compensatory damages (breach of contract/fraud/Ohio Consumer Sales Practices) plus breach of fiduciary duty damages ($3,000 per plaintiff) plus punitive damages as assigned against TWA per plaintiff.

2. Denotes damages for breach of fiduciary duty.

Chart E

DONALD S. FLETCHER JUDGMENT

PLAINTIFF	JUDGMENT[1]	PORTION JOINT & SEVERAL[2]	JOINT & SEVERAL AGAINST WHOM
G. Adler	$ 85,041.50	$ 80,041.50	$ 3,000.00 All;[3] 77,041.50 MONY[4]
H. Adler	$ 85,041.50	$ 80,041.50	$ 3,000.00 All; 77,041.50 MONY
J. Abney	320,180.00	180,942.60	3,000.00 All; 177,942.60 MONY
A. Clark	150,462.50	145,462.50	3,000.00 All; 142,462.50 MONY
M. Clark	150,462.50	145,462.50	3,000.00 All; 142,462.50 MONY

Chart E

DONALD S. FLETCHER JUDGMENT

(Continued)

PLAINTIFF	JUDGMENT[1]	PORTION JOINT & SEVERAL[2]	JOINT & SEVERAL AGAINST WHOM
E. Davis	207,761.00	202,761.00	3,000.00 All; 199,761.50 MONY
M. Davis	207,761.00	202,761.00	3,000.00 All; 199,761.50 MONY
D. Griffey	197,354.00	97,677.00	3,000.00 All; 94,677.00 MONY
S. Griffey	197,354.00	97,677.00	3,000.00 All; 94,677.00 MONY
Sh. Johnson	23,075.00	3,000.00	3,000.00 All
Sa. Johnson	44,625.50	21,312.75	3,000.00 All; 18,312.75 MONY

Chart E

DONALD S. FLETCHER JUDGMENT

(Continued)

PLAINTIFF	JUDGMENT[1]	PORTION JOINT & SEVERAL[2]	JOINT & SEVERAL AGAINST WHOM
W. Johnson	44,625.50	21,312.75	3,000.00 All; 18,312.75 MONY
G. Lamb	163,736.00	65,294.40	3,000.00 All; 62,294.40 MONY
J. Lamb	163,736.00	65,294.40	3,000.00 All; 62,294.40 MONY
B. Lenard	60,614.00	29,307.00	3,000.00 All; 26,307.00 MONY
C. Lenard	60,614.00	29,307.00	3,000.00 All; 26,307.00 MONY
H. Lenard	125,682.50	61,841.25	3,000.00 All; 58,841.25 MONY

Chart E

DONALD S. FLETCHER JUDGMENT

(Continued)

PLAINTIFF	JUDGMENT[1]	PORTION JOINT & SEVERAL[2]	JOINT & SEVERAL AGAINST WHOM
R. Lenard	125,682.50	61,841.25	3,000.00 All; 58,841.25 MONY
D. Lenard	38,303.00	3,000.00	3,000.00 All
C. Page	70,379.00	3,000.00	3,000.00 All
W. Page	70,379.00	3,000.00	3,000.00 All
S. Poast	56,538.50	51,538.50	3,000.00 All; 48,538.50 MONY
T. Poast	56,538.50	51,538.50	3,000.00 All; 48,538.50 MONY

Chart E

DONALD S. FLETCHER JUDGMENT

(Continued)

PLAINTIFF	JUDGMENT[1]	PORTION JOINT & SEVERAL[2]	JOINT & SEVERAL AGAINST WHOM
E. Smith	81,198.50	21,299.63	3,000.00 All; 18,299.63 MONY
M. Smith	81,198.50	21,299.63	3,000.00 All; 18,299.63 MONY
Rob. Storms	174,927.50	169,927.50	3,000.00 All; 166,927.00 MONY
Ros. Storms	174,927.50	169,927.50	3,000.00 All; 166,927.00 MONY
L. Terrell	88,013.00	83,013.00	3,000.00 All; 80,013.00 MONY

Chart E

DONALD S. FLETCHER JUDGMENT

(Continued)

PLAINTIFF	JUDGMENT[1]	PORTION JOINT & SEVERAL[2]	JOINT & SEVERAL AGAINST WHOM
W. Terrell	88,013.00	83,013.00	3,000.00 All; 80,013.00 MONY
TOTAL	$3,394,225.00	$2,251,894.66	$ 87,000.00 All; $2,164,894.66 MONY

1. Judgment for each plaintiff calculated by adding the TOTAL RICO trebled damages plus breach of fiduciary duty damages ($3,000.00 per plaintiff) plus punitive damages as assigned against Donald Fletcher per plaintiff ($5,000).

2. Portion of damages which are subject to joint and several liability is the sum of RICO damages plus damages for breach of fiduciary duty.

3. Denotes fiduciary duty potion.

4. Denotes RICO portion apportioned to MONY.

Chart F

FLETCHER INSURANCE ASSOCIATES JUDGMENT

PLAINTIFF	JUDGMENT[1]	PORTION JOINT & SEVERAL[2]	JOINT & SEVERAL AGAINST WHOM
G. Adler	$ 33,680.00	$ 3,000.00	All Defendants
H. Adler	33,680.00	3,000.00	All Defendants
J. Abney	112,060.00	3,000.00	All Defendants
A. Clark	55,487.50	3,000.00	All Defendants
M. Clark	55,487.50	3,000.00	All Defendants
E. Davis	74,587.00	3,000.00	All Defendants
M. Davis	74,587.00	3,000.00	All Defendants
D. Griffey	71,118.00	3,000.00	All Defendants
S. Griffey	71,118.00	3,000.00	All Defendants
Sh. Johnson	13,025.00	3,000.00	All Defendants
Sa. Johnson	20,208.50	3,000.00	All Defendants
W. Johnson	20,208.50	3,000.00	All Defendants
G. Lamb	59,912.00	3,000.00	All Defendants
J. Lamb	59,912.00	3,000.00	All Defendants

Chart F

FLETCHER INSURANCE ASSOCIATES JUDGMENT

(Continued)

PLAINTIFF	JUDGMENT[1]	PORTION JOINT & SEVERAL[2]	JOINT & SEVERAL AGAINST WHOM
B. Lenard	25,538.00	3,000.00	All Defendants
C. Lenard	25,538.00	3,000.00	All Defendants
H. Lenard	47,227.50	3,000.00	All Defendants
R. Lenard	47,227.50	3,000.00	All Defendants
D. Lenard	18,101.00	3,000.00	All Defendants
C. Page	28,793.00	3,000.00	All Defendants
W. Page	28,793.00	3,000.00	All Defendants
S. Poast	24,179.50	3,000.00	All Defendants
T. Poast	24,179.50	3,000.00	All Defendants
E. Smith	32,399.50	3,000.00	All Defendants
M. Smith	32,399.50	3,000.00	All Defendants
Rob. Storms	63,642.50	3,000.00	All Defendants
Ros. Storms	63,642.50	3,000.00	All Defendants

Chart F

FLETCHER INSURANCE ASSOCIATES JUDGMENT

(Continued)

PLAINTIFF	JUDGMENT[1]	PORTION JOINT & SEVERAL[2]	JOINT & SEVERAL AGAINST WHOM
L. Terrell	34,671.00	3,000.00	All Defendants
W. Terrell	34,671.00	3,000.00	All Defendants
TOTAL	$1,286,074.00	$87,000.00	All Defendants

1. Judgment for each plaintiff calculated by adding compensatory damages (breach of contract/fraud/Ohio Consumer Sales Practices) plus breach of fiduciary duty damages ($3,000 per plaintiff) plus punitive damages assigned against FIA per plaintiff.

2. Denotes fiduciary duty portion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EMMETT R. DAVIS, et al.,	:	C-1-87-0727
Plaintiffs,	:	
vs.	:	ORDER DENYING ALL MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR NEW TRIAL
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, et al,	:	
Defendants.	:	[Filed May 18, 1990]

The defendants Mutual of New York ("MONY") and Trans World Assurance Company ("TWA") have each moved for judgment notwithstanding the verdict, pursuant to Fed. R. Civ. P. 50(b) or, alternatively, for a new trial, pursuant to Fed. R. Civ. P. 59 (TWA doc. 167; MONY doc. 168). Plaintiffs have filed a memorandum in opposition to each motion (doc 174 opp. to motion of TWA; doc. 177 opp. to motion of MONY). The defendant MONY has replied to plaintiffs' memorandum in opposition (doc. 181). Plaintiffs also submitted a letter explaining a misstatement contained in both of their memoranda in opposition to defendants' motions (doc. 185). In addition, the plaintiffs have moved for a new trial solely on the issue of punitive damages against MONY (doc. 170), which is opposed by MONY (doc. 179), and for a new trial solely on the issue of damages against TWA, which is opposed by TWA (doc. 173).

We begin by observing that this has been a complex, bitterly fought case. Every effort was made during trial to allow each party to try its case as it saw fit and to ensure that the jury had competent evidence before it so that it could make its findings in accordance

with the evidence presented and the law. We have carefully reviewed the record before us and the arguments of counsel in their briefs in support of and contra to these various post-trial motions. For the following reasons, we conclude that the jury reached a reasonable verdict on all issues presented to it and that the judgment which we issued was appropriate, and, thus, by this Order, we shall deny all pending motions for judgment notwithstanding the verdict and for a new trial.

BACKGROUND

This jury trial, involving claims by twenty-nine plaintiffs against four defendants, MONY, TWA, Donald S. Fletcher and Fletcher Insurance Associates ("FIA"), began on December 4, 1989. Plaintiffs alleged that these defendants were liable to them for damages under common law breach of contract, fraud, violations of the Ohio Consumer Sales Act, breach of fiduciary duty, RICO, and conspiracy for injuries sustained as a result of a "tax and insurance" program that was sold to the plaintiffs by Donald Fletcher and others and which program was allegedly approved and promoted by the defendant insurance companies. The Defendants MONY and TWA moved for directed verdicts at the close of the Plaintiffs' evidence; except for dismissing two plaintiffs' claims under the Ohio Consumer Sales Practices Act, the defendants motions were denied. The defendants renewed their motions at the close of all of the evidence, which motions also were denied.

The case was submitted to the jury on February 1, 1990. The jury returned its verdict on February 12, 1990, having answered a twenty-five page set of Special Interrogatories (doc. 149-A) on the issues of liability and damages. A supplemental interrogatory was submitted to the jury and answered on February 14, 1990 (doc. 152). Based upon the jury's answers, we entered judgment in the amount of $3,587,274.00 in favor of the plaintiffs, apportioning damages among all of the defendants, where appropriate, on the breach of contract, fraud, Ohio Consumer Sales Practices Act, and breach of

fiduciary duty claims and against Defendants MONY and Fletcher on the RICO (18 U.S.C. § 1962(c)) claim, as set forth in our Judgment (doc. 160).

I. DEFENDANTS' MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Defendants Trans World Assurance and Mutual of New York have both moved for judgment notwithstanding the verdict, but for different reasons. As counsel for Plaintiffs' letter of May 1, 1990 (doc. 185) acknowledges, the sections of their memoranda setting forth their opposition to defendants' motions for judgment notwithstanding the verdict contain erroneous statements: they urged this Court to deny these motions because of their belief that the defendants had failed to move for directed verdicts at the close of all of the evidence (doc. 174 at 1, doc. 177 at 1-2); the defendants had so moved, and their timely motions for judgment notwithstanding the verdict are properly before the Court. As plaintiffs' sole argument against our granting each defendant's motion for judgment notwithstanding the verdict was premised on the mistaken belief that these motions were procedurally defective, the substance of defendants' arguments, in effect, is unopposed by the plaintiffs. Generally, the failure of a party to oppose a motion may warrant the Court's granting the motion as filed. S.D. Ohio. R. 4.0.2. Because this has been a complex case, however, we shall address all arguments of the defendants as if they were disputed by the plaintiffs.

Standard

For those claims arising under state law, state law governs the grant of judgment notwithstanding the verdict. *Toth v. Yoder*, 749 F.2d 1190, 1194 (6th Cir. 1984). Ohio law follows federal law in this regard; the standard for granting a motion for judgment notwithstanding the verdict ("J.N.O.V.") is identical to that for granting a directed verdict. *Standard Alliance Industries, Inc.*, 587

F.2d 813, 823 (6th Cir. 1978). To grant a motion for J.N.O.V., the evidence must be such that there can be but one reasonable conclusion as to the proper verdict. *McJunkin Corp. v. Mechanicals, Inc.*, 888 F.2d 481, 485 (6th Cir. 1989); *Standard Alliance*, 587 F.2d at 823. In reviewing the evidence, the court cannot weight the evidence and it must construe the evidence, and the inferences to be drawn therefrom, in the light most favorable to the non-moving party. *Hildebrand v. Board of Trustees Michigan State University*, 662 F.2d 439, 443 (6th Cir. 1981).

A. Motion J.N.O.V. of Defendant Trans World Assurance.

Defendant TWA argues that the jury erred in finding it liable to plaintiffs for breach of contract, fraud, the violation of the Ohio Consumer Sales Practices Act and for breach of fiduciary duty. The gist of its arguments as to each of those claims is that TWA cannot be held liable for the actions of Donald L. Fletcher because TWA did not authorize Fletcher to do anything other than sell life insurance and it lacked full knowledge of Fletcher's activities with regard to the so-called "tax and insurance" seminars, thus there could be no liability based on apparent or implied authority or ratification. Additionally, as to the breach of fiduciary duty claim, TWA argues that as a matter of law it cannot be liable to those plaintiffs who were never TWA insureds.

Having reviewed TWA's arguments and the record in this case, we conclude that there was sufficient evidence in this case to create factual issues as to whether Fletcher was acting within the scope of authority as an agent of TWA and whether TWA ratified Fletcher's wrongful activities. It was up to the jury to accept or reject, in whole or in part, testimony as to TWA's knowledge of Fletcher's activities. Thus, we cannot say, as a matter of law, that no reasonable jury could find, as this jury did, that TWA was liable to plaintiffs on the contract, fraud, and Ohio Consumer Sales Practices Act claims.

Additionally, we cannot say that no reasonable jury could find TWA liable to plaintiffs who were not TWA insureds for breach of fiduciary duty. The jury could conclude from the evidence that when Fletcher was acting as National Marketing Director for TWA he had contact with plaintiffs who were not insureds of TWA, and through those contacts, a fiduciary duty arose which was breached.

Accordingly, because there was sufficient evidence to create issues of fact as to TWA's liability for breach of contract, fraud, violation of Ohio Consumer Sales Practices Act, and breach of fiduciary duty, TWA's motion for judgment notwithstanding the verdict must be DENIED on all grounds raised.

B. Motion J.N.O.V. of Defendant Mutual of New York.

MONY contends that it is entitled to judgment in its favor as a matter of law on the RICO claim, 18 U.S.C. § 1962(c). It argues that the jury either was erroneously lead to find it liable for RICO violations based on respondeat superior liability for the acts of Donald Fletcher or because the jury failed to distinguish the "person" from the "enterprise," by finding MONY to have violated RICO by participating in the affairs of an enterprise made up of its own agents.

MONY argues that the evidence presented to the jury was that Fletcher Insurance Associates was the "enterprise" and that Donald S. Fletcher and MONY were the "persons" and, as such, the verdict against MONY compels the conclusion that MONY was actually the enterprise and thus, cannot be liable to plaintiffs under RICO. We certainly cannot argue with MONY's citations to prior opinions of this Court in which we held that RICO requires that the "person" must be separate from the "enterprise" in order to establish civil liability under section 1962(c). *Griffin v. O'Neal Jones & Feldman, Inc.*, 604 F. Supp. 717 (S.D. Ohio 1985) (Spiegel, J.); *Bays v. Hunter Sav. Ass'n.*, 539 F. Supp. 1020 (S.D. Ohio 1982) (Spiegel, J.). We continue to hold, consistent with a majority of the courts

that have encountered this issue, that this distinction is necessary. *See e.g., Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 29-30 (1st Cir. 1986) and the cases cited therein.

We disagree with MONY's conclusion about the jury verdict in this case. As the *Schofield* court explains, RICO "envisions liability where there is a specified interaction between the two entities; thus the same corporation may not serve in two roles at the same time." *Id.* at 30. In this case, the jury was carefully instructed that an individual or corporation cannot be both the "enterprise" and the "person" under RICO. *See* Jury Instructions at 32. Moreover, these instructions carefully followed the statutory definitions for "person" and "enterprise" under 18 U.S.C. § 1961 (3) and (4). We think that there was sufficient evidence presented for a reasonable jury to decide that Fletcher Insurance Associates, a group of persons who were sales agents for MONY as well as several other insurance companies, was the "enterprise" and that MONY and Fletcher were the separate, culpable "persons" in order to find that MONY had violated RICO. FIA was a separate entity for purposes of 18 U.S.C. § 1962(c); this is not an example of a plaintiff claiming that the corporation is the "person" and at the same time that an unincorporated division of the same corporation is the 'enterprise' as described in *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982). Thus, we cannot say, as a matter of law, that legal error occurred here in the form of any failure to distinguish the "enterprise" from the "person."

Moreover, consistent with our belief that there must be a distinction between the "enterprise" and "person" for RICO liability, we also agree with those courts that have held that RICO liability must be based on the culpable conduct of a corporate defendant and cannot be based upon vicarious liability. *See e.g., Schofield*, 793 F.2d at 32; *First National Bank of Louisville v. Lustig*, 727 F. Supp. 276 (E.D. La. 1989). Thus, we find no fault with MONY's arguments as to the applicable law, however, we think that it would be speculative for us to assume that the jury in this case improperly found MONY liable to plaintiffs for a violation of RICO on the

basis of *respondeat superior*. Our review of the record convinces us that there was sufficient evidence in this case for a reasonable jury to find that MONY was directly liable under RICO. As we explained in a related case, "if the defendants ratified or authorized [this] fraudulent scheme, they [are] directly liable. If . . . Fletcher and others were acting with apparent authority but . . . the defendants were otherwise without knowledge of the scheme, then the use of *respondeat superior* might well be inappropriate." *Rowland v. Mutual Life Ins. Co. of New York*, 689 F. Supp. 793, 799 (S.D. Ohio 1988) (Spiegel, J.). A reasonable jury could conclude that MONY's conduct with regard to Fletcher's scheme was not simply passive acquiescence, or evidence of apparent authority, but that it constituted active promotion of this fraudulent "tax and insurance program." Thus, based on MONY's own conduct, not just because of vicarious liability for the acts of Fletcher, a reasonable jury could find that MONY had the "intent" to defraud necessary to find RICO liability. *See* Jury Instructions at 35, 37, & 38.

We also think that if the jury's decision with regard to RICO liability was based on vicarious liability for the acts of Donald Fletcher, then it would have found TWA liable under RICO as well as MONY. The jury made some careful, reasoned distinctions, based on the evidence presented to them, that TWA and MONY were not equally culpable in this matter: the jury seemed to find that TWA had enough knowledge of this fraudulent scheme to make it vicariously liable to these plaintiffs for common law fraud, it reasonably could have concluded that TWA's actions did not render it directly liable to plaintiffs as is required for a violation of RICO. We see no reason to disturb the jury's reasonable verdict as to plaintiffs' RICO claim.

Accordingly, for the foregoing reasons, we conclude that MONY's argument that errors of law occurred in finding it liable under RICO is not well-taken. MONY's motion for judgment notwithstanding the verdict as to the RICO claim must be DENIED.

II. MOTIONS FOR A NEW TRIAL

Standard.

Although courts are accorded broad discretion in ruling on motions for a new trial, generally, they do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done. *See generally*, 11 C. Wright & A. Miller, Federal Practice and Procedure § 2803 (1973). A new trial must be granted when the trial court concludes that the verdict is against the clear weight of the evidence. *Bruner v. Dunaway*, 684 F.2d 422, 425 (6th Cir. 1982). In contrast to the review accorded the evidence on a motion notwithstanding the verdict, when considering a motion for a new trial, the court is free to compare the opposing evidence and weigh the evidence. *Id.*; *see also Toth v. Yoder*, 749 F.2d 1190, 1197 (6th Cir. 1984). However, "courts are not free to reweigh the evidence and set aside the jury verdicts merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Bruner*, 684 F.2d at 422 (quoting *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35 (1944)). In other words, the jury's verdict should be accepted if it is one which could reasonably have been reached. *Toth*, 749 F.2d at 1197; *Bruner*, 684 F.2d at 422.

A. Defendant Trans World Assurance's Motion for a New Trial.

Defendant TWA moves for a new trial for numerous reasons: (1) the Court erred in allowing testimony concerning the *Hofstetter* judgment; (2) the Court erred in allowing Plaintiffs to call Sandra Goldstick and Evelyn Johnson as witnesses "for the sole purpose of having them invoke their Fifth Amendment right in the presence of the jury;" (3) the Court erred in failing to give certain jury instructions proposed by the defendant MONY, as adopted by TWA; and (4) the Court erred in prohibiting TWA's president from testifying about phone conversations with Evelyn Johnson. TWA

also moves for a new trial or a remittitur on the issue of damages. The plaintiffs' oppose each of these grounds for a new trial.

If errors were made as alleged by TWA, we do not believe that they were so harmful as to deprive TWA of a fair trial. With regard to TWA's first stated ground for a new trial, we gave specific limiting instructions to the jury so that it was clear that the jury should not draw any inferences about liability against the defendant insurance companies from the *Hofstetter* judgment. With these safeguards in place, we cannot perceive of how TWA was unfairly prejudiced by admitting this competent evidence. Fed. R. Evid. 803(8).

Second, we carefully considered the propriety of permitting plaintiffs to call Evelyn Johnson and Sandra Goldstick as witnesses when it was known that they intended to invoke their fifth amendment privileges. Mindful of the potential for unfair prejudice we limited plaintiffs' examination of these witnesses; "sharp practice" was not permitted. *See Cerro Goro Charity v. Fireman's Fund Life Ins. Co.*, 819 F.2d 1471, 1480-82 (8th Cir. 1987); *RAD Services, Inc. v. Aetna Casualty Co.*, 808 F.2d 271, 277 (3rd Cir. 1986). We believe that the probative value of the evidence substantially outweighed any unfair prejudice to this defendant by having these non-party witness called to the stand and having them invoke their fifth amendment privileges before the jury. Fed. R. Evid. 403. Thus, TWA is not entitled to a new trial on this ground.

As to TWA's third ground, we do not believe that the failure to give a specific instruction on "independent contractors" or "life insurance agents," submitted by MONY and adopted by TWA (*See* docs. 124 at 12-13; 135), warrants a new trial. The crucial factual question for the jury to determine was whether under the doctrines of agency or ratification TWA was liable to plaintiffs for Fletcher's conduct; the jury was instructed, in detail, on the law of agency, including scope of authority and termination of agency. The jury had sufficient instructions to make its findings; the proposed instructions were not necessary.

Fourth, we do not think it was error to refuse Mr. Royals' testimony as to what Evelyn Johnson said to him in a telephone conversation several months prior to trial; the contents are not simply "a statement of [her] then existing state of mind" (Fed. R. Evid. 803(3)), they were inadmissible hearsay. Fed. R. Evid. 801(c); 802.

Finally, TWA moves this court for a new trial on damages or for a remittitur to reduce the total judgment against all of the defendants to $1.1 million dollars plus reasonable attorney's fees, arguing that remitting the excess would bring the judgment into compliance with the jury's wishes that the damages awarded "'get [the plaintiffs] out of the hole' and to make them come out even with the IRS; and to have each of them 'start from scratch." Note from Jury Submitted with Interrogatories (doc. 149-A). Although TWA's memorandum in support is not entirely clear, we assume TWA is arguing that the judgment should reflect only the amounts of IRA-related damages (taxes, penalties, interest) incurred by the plaintiffs.

We do not find TWA's arguments persuasive. The judgment against this defendant ($439,072.50) is not excessive in view of the extent and nature of the injuries sustained by these plaintiffs as a result of the defendants' conduct. There shall be no new trial on the issue of damages, nor shall we require the plaintiffs to acquiesce to a remittitur.

For the foregoing reasons, we conclude that TWA's motion for a new trial is not well-taken. It is hereby DENIED.

B. Defendant Mutual of New York's Motion for a New Trial.

We interpret MONY's memorandum as arguing that the above arguments with regard to its motion for JNOV on the RICO claim, also support, in part, its motion for a new trial. Upon consideration of the credibility of the testimony and weighing the opposing testimony, we conclude that the jury's verdict was

reasonable; we do not think that the record was tainted by any trial errors in "blurring" the distinctions between "enterprise" and "person" for RICO liability, nor do we think it is reasonably clear that the jury found MONY to be liable for RICO violations based on vicarious liability for the racketeering activity of Donald Fletcher. MONY is not entitled to a new trial on these grounds.

Defendant Mutual of New York, like TWA, views the amount of the judgment as being excessive in view of the aforesaid message from the jury and, thus moves for a new trial or remittitur. In addition to the arguments raised by TWA, MONY also contends that because the Court failed to instruct the jury that RICO damages would be trebled, the RICO judgment against MONY damages, conflicted with the jury's explicit intent. We do not believe that the jury should be instructed as to the trebling of RICO damages. *See Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1308 n. 7 (7th Cir. 1987) (citing *Heatransfer Corp. v. Volkswagenwerk A.G.*, 553 F.2d 984 (5th Cir.), *cert. denied*, 434 U.S. 1987 (1977) (analogous case wherein court held jury should not be instructed as to trebling of Antitrust damages)). Having carefully reviewed the evidence in the record and the jury's verdict in this case, we conclude that the judgment against MONY on all claims - breach of contract, fraud, Ohio Consumer Sales Practices Act, and breach of fiduciary duty - was not excessive and shall not be set aside or amended.

MONY also claims to have been deprived of a fair trial because this Court permitted Evelyn Johnson and Sandra Goldstick to testify and invoke their fifth amendment privileges before the Jury. As we stated, above, in response to TWA's motion, a new trial is not warranted on this ground.

For the foregoing reasons, we conclude that MONY's motion for a new trial must be DENIED.

C. Plaintiffs' Motion for a New Trial Solely on Damages Against Trans World Assurance.

Plaintiffs argue that they are entitled to a new trial solely on damages against the defendant Trans World Assurance for four reasons: (1) Trans World's closing argument to the jury suggesting that plaintiffs and their counsel fabricated testimony is *per se* grounds for a new trial; (2) its closing argument stating that plaintiffs and their counsel were seeking "big windfalls" from this litigation was improper; (3) it was prejudicial error to admit the testimony of Barbara Brown, which testimony was only offered as an attack on the motivation of plaintiffs' counsel; and (4) it was error to admit Trans World's Exhibit 18. Defendant TWA opposes a new trial solely on the issues of damages, but in light of its own motion for a new trial, obviously favors a new trial on both liability and damages. In light of the jury verdict in this case, which we think was reasonable, we do not believe that plaintiffs are entitled to a new trial on damages against TWA.

Plaintiffs' first and second grounds for a new trial raise serious allegations of misconduct on the part of TWA's trial counsel. Plaintiffs argue that TWA's remarks in closing argument, which plaintiffs contend were irrelevant to the claims at issue and not supported by any evidence in the record, "created unfair prejudice and passion against Plaintiffs and their counsel on the issue of damages. . ." For these reasons, plaintiff contends it is entitled to a new trial on the issue of damages, only.

We may order a new trial on the basis of counsel misconduct "where there is a reasonable probability that the verdict of the jury has been influenced by such conduct." *Twatchman v. Connelly*, 106 F.2d 501, 508-09 (6th Cir. 1939). to determine if there is a "reasonable probability" that the jury verdict in this case has been so affected, we must consider "the totality of the circumstances, including the nature of the comments, their frequency, the possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments,

the strength of the case (e.g. whether it is a close case), and the verdict itself." *City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749, 756 (6th Cir. 1980).

We are well aware that TWA's counsel's closing argument was caustic and did, indeed, focus to a great extent on the credibility of the plaintiffs. We cannot agree with plaintiffs that TWA's closing argument lacked relevance to the issues at hand. From the outset of trial, plaintiffs were portrayed by their counsel as highly ethical, trusting individuals, who were defrauded by defendants who knowingly took advantage of their vulnerability. The credibility of the plaintiffs' versions of the facts, including their motivation in pursuing this litigation, was a legitimate area to examine and to comment on in closing argument; it was relevant to the issues of whether the plaintiffs' reliance on Fletcher's representations was reasonable as well as whether plaintiffs reasonably mitigated their damages.

We also disagree with plaintiffs that TWA's argument about the plaintiffs seeking a "windfall" was unsubstantiated in the record. There was testimony, albeit primarily from Barbara Brown, that some of the plaintiffs were under the impression that they would be better off pursing this litigation rather than actively pursuing their audits with the IRS. The jury was free to accept or reject this testimony as well counsel's characterization of the testimony. Thus, because there was some factual basis in the record for TWA's arguments questioning the motivation of plaintiffs and their counsel in pursuing this litigation, we conclude that this part of TWA's closing argument did not "so far exceed the bounds of proper argument" that a new trial is warranted. *City of Cleveland, supra*, at 760 (quoting *Draper v. Airco, Inc.*, 580 F.2d 91, 94 (3rd Cir. 1978)).

Plaintiffs also argue that TWA's comments in closing about Tom and Sheila Poast not following a "script" was false and highly prejudicial. We observed that their testimony did differ from that of many of the other plaintiffs who had either seen the videotaped

deposition or who had frequented trial. It was up to the jury to believe or disbelieve the testimony presented to them and to accept or reject counsel's characterization of the testimony. Obviously, the jury rejected any suggestion that the Poasts' version of events was more accurate than other plaintiffs' because the jury did not make any distinctions, on either liability or damages, between the Poasts and any of the other plaintiffs. We do not think that it is improper for counsel to comment on the credibility of witnesses' testimony, including whether any testimony may have been influenced by the fact that many of the plaintiffs did hear other plaintiffs testify about factually similar experiences.

Above all, we were very impressed with the careful, reasoned deliberations of this jury. In response to TWA's motion for a new trial or remittitur, we concluded, above, that the judgment entered against it, $439,072.50, was not excessive in light of the plaintiffs' injuries and the claims that the plaintiffs successfully established. Likewise, we do not think that the damages awarded were unreasonably low, especially considering that the jury recommended that this defendant pay $129,500 in attorney's fees in addition to the compensatory and punitive damages award. By separate Order, we shall, in due course, determine appropriate attorney's fees in this case. However, it is evident that by this recommended attorney's fee, which was presented to the jury as a form of punitive damages, in addition to the other damages awarded, the jury clearly recognized the seriousness of this defendant's culpable conduct and the extent of the plaintiffs injuries sustained thereby. In light of all of the circumstances, we cannot conclude there is a reasonable probability that the jury's damage verdict was adversely affected by improper comments made during TWA's closing argument. Therefore, we shall not order a new trial on the basis of plaintiffs' allegations of misconduct on the part of TWA's trial counsel.

The issue of whether Barbara Brown's testimony should have been permitted is related. As we believe that the issues of whether the plaintiffs' reliance on Fletcher's representations was

reasonable and whether the plaintiffs had pursued reasonable ways to mitigate their losses were legitimate areas to pursue, we cannot agree that Ms. Brown's testimony was irrelevant to the merits of this case. Moreover, numerous plaintiffs testified about Ms. Brown's role in the tax and insurance program, thus we see nothing improper in permitting her testimony to rebut plaintiffs' allegations.

Finally, plaintiffs argue that it was error to admit TWA exhibit 18, which was a summary of other documents, because TWA never produced the underlying documents. *See* Fed. R. Evid. 1006. We do not consider the admission of TWA's exhibit 18, which purported to detail the relationship between TWA and those plaintiffs who were TWA insureds, to have been error. As we understand it, the information contained in this chart came from documents which the plaintiffs used to prepare their damages chart. Even if its admission was erroneous, in view of the totality of the evidence in this case, such error was harmless. *See* Fed. R. Civ. P. 61.

For the foregoing reasons, a new trial on damages against TWA is not warranted. Plaintiffs' motion is DENIED.

D. Plaintiffs' Motion for a New Trial Solely on Punitive Damages Against Defendant Mutual of New York.

Plaintiffs' cursory motion for a new trial against MONY is similar to their motion against TWA in that plaintiffs also raise allegations of counsel misconduct during MONY's closing argument. Specifically, plaintiffs alleged that a chart that was labelled "Conflict of Interest" and several comments about the credibility and integrity of the plaintiffs were so improper that the jury was unfairly prejudiced against plaintiffs and their counsel to such a degree that an unreasonably low amount of punitive damages were awarded against MONY.

We are at a loss to understand why plaintiffs believe that only the punitive damage award against MONY was adversely

affected by passion and prejudice against plaintiffs and their counsel and yet do not seem to think that the jury's verdict as to liability or compensatory damages was so affected. *See City of Cleveland, supra*, at 759 (observing that prejudice with respect to damages likely to "spillover" and affect findings as to liability).

Our conclusions and reasoning, above, in denying plaintiffs' motion for a new trial on damages against TWA apply to this motion as we do not consider the examples cited by plaintiffs, viewed collectively, to be more egregious or inappropriate than the statements made during TWA's closing argument. Similarly, we consider the punitive damages against MONY, including the recommended attorney's fee award, to be reasonable under all of the facts and circumstances of this case.

Accordingly, we must also DENY plaintiffs' motion for a new trial solely on the issue of punitive damages against MONY.

CONCLUSION

In light of the foregoing, we conclude that the jury's verdict and the judgment against these defendants are reasonable and must stand. Defendants' motions for judgment notwithstanding the verdict or, alternatively, for a new trial, are hereby DENIED. Moreover, plaintiffs' motions for a new trial solely on the issue of punitive damages against Mutual of New York and solely on the issue of damages against TWA are DENIED.

SO ORDERED

/s/ S. ARTHUR SPIEGEL
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EMMETT R. DAVIS, et al.,	:	No. C-1-87-727
Plaintiffs,	:	
vs.	:	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, et al,	:	ORDER AWARDING ATTORNEYS' FEES
	:	[Filed August 10, 1990]
Defendants.	:	

This matter is before the Court after a hearing on the plaintiffs' application and accompanying exhibits for an award of attorneys' fees and expenses (docs. 175, 176), which is opposed by the defendants Trans World Assurance "(TWA") (doc. 183) and Mutual of New York ("MONY") (doc. 188). Plaintiffs have filed memoranda in reply to TWA's response (doc. 187) as well as to that of MONY (doc. 194). With leave of this Court, defendant TWA has also filed a surreply to plaintiff's motion for attorneys' fees (doc. 191). The Court has also considered the affidavit of Jed S. Ringel on behalf of MONY (doc. 206). Upon consideration of the arguments of counsel, and mindful of the jury's intent,[1] we have

[1]In a note accompanying its answers to the Special Interrogatories, the jury wrote:

> Judge Spiegel:
>
> It is the intent of the jury to award to the plaintiffs enough money to "get them out of the hole," and to make them come out even with the IRS; and to have each of them "start from scratch."

determined that an award of attorneys' fees is appropriate in this case, but not for the full amount requested.

In this case, twenty-nine plaintiffs joined in claiming that four defendants -- Donald S. Fletcher, Fletcher Insurance Associates, the Mutual Life Insurance Company of New York, and Trans World Assurance Company -- were liable to them for compensatory and punitive damages for breach of contract, fraud, breach of fiduciary duty, violations of Ohio Consumer Sales Practices Act, RICO, and conspiracy for injuries sustained as a result of a "tax and insurance" program.

This jury trial commenced on December 4, 1989, more than two years after the initial complaint was filed. This case took two and one-half months to try. The jury found that all defendants were liable to all of the plaintiffs on their claims for breach of contract, fraud, breach of fiduciary duty, and violations of the Ohio Consumer Sales Practices Act, and that defendants Fletcher, Fletcher Insurance Associates, and MONY had violated RICO. In addition to awarding compensatory and punitive damages against these defendants, the jury also indicated that the defendants should pay $518,040.00, representing 35% of the total damages awarded, for plaintiffs' attorneys' fees, divided equally among the four defendants. *See* doc. 149A. We entered judgment in the amount of $3,587,274.00 in

---

The jury wrote a separate note with regard to the amount of attorney's fees that should be awarded to the plaintiffs:

> Judge Spiegel:
>
> We wish the defendants to pay the attorney's fees - not the plaintiffs (the amount awarded to plaintiffs should not be included in the attorney's fees). ONLY the defendants are to pay attorney's fees for the plaintiffs. This is what we want done on pg: 21A, (Can we alter this page stating "This amount is to be paid by the defendants." "The 35% SHOULD NOT be taken out of plaintiff's award."

See Doc. 175, Ex. B.

favor of the plaintiffs, apportioning damages among the defendants as set forth in our Judgment (doc. 160). We did not include an award of attorneys' fees in the Judgment.

As prevailing parties, plaintiffs now seek an award of attorneys' fees in the amount of $1,327,261.06 and reimbursement of costs and expenses totaling $21,060.50 pursuant to RICO, 18 U.S.C. § 1964(c) and the Ohio Consumer Sales Practices Act, Ohio Rev. Code § 1345.09(F). Plaintiffs' counsel state that they arrived at their total requested attorneys' fees figure by enhancing their "lodestar" calculation (hours expended times hourly rate) by 75% (a multiplier of 1.75) and then reducing that product by $30,000, representing a credit previously agreed to by the parties. *See* Ex. A to doc. 175.[2] Plaintiffs have supported their fee and expense requests with affidavits of the principal attorneys, William H. Blessing, Michael G. Florez, and Dale O. Lierman, to which their contemporaneously-prepared time records are attached. Additionally, they have presented affidavits of Duke W. Thomas, Stanley M. Chesley, and W.B. Markovits, attorneys practicing in this community who have attested to the reasonableness of the fees requested and the propriety of a fee enhancement in this case.

ATTORNEYS' FEES

The Lodestar Calculation

Under RICO, 18 U.S.C. § 1964(c), the plaintiffs, as prevailing parties may recover "a reasonable attorney's fee." Likewise, the Ohio Consumer Sales Practices Act provides that the prevailing parties may be awarded "a reasonable attorney's fee limited to the work reasonably performed." Ohio Rev. Code

[2]There is a discrepancy between the "Net Fee Request" on plaintiffs' Ex. A and the amount of their request as stated on page 1 of their Application. For purposes of this Order we presume the amount stated in the text of the Application, $1,327,261.06, is the actual fee requested.

1345.09(F). The starting point for determining the amount of a "reasonable attorney's fee" is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1988) (construing analogous fee shifting statute, 42 U.S.C. §1988).

Plaintiffs calculate the "lodestar figure" to be $770,329.00, reflecting nearly 3900 hours in attorney time and approximately 2400 hours in investigator, paralegal, and law clerk time expended in the successful representation of the plaintiffs in this litigation. We believe that plaintiffs' calculated lodestar may be in error; our calculation of the total fees requested by the offices of Messrs. Blessing, Florez and Lierman yields a product of $775,577.75. We do not know if the apparent discrepancy is due to typographical or mathematical errors on the part of the plaintiffs. However, we shall use plaintiffs' requested lodestar of $770,329.00 in arriving at the attorneys' fees to be awarded in this case. We have set forth plaintiffs' itemization of time spent and hourly fees requested in detail in Appendix A, attached to this Order.

1. Determining the Reasonable Hours Spent on *Davis*.

Defendants MONY and TWA argue that the number of hours expended on this matter, both by attorneys and paralegals, were excessive, reflecting overstaffing, excess conferencing among attorneys, and billing for time unrelated to this litigation. Defendants also contend that many time entries are poorly documented and should be disregarded by this Court. Thus, defendants urge a significant reduction from the lodestar figure suggested by the plaintiffs.

We believe that plaintiffs' counsel achieved excellent results in this case. This has been a complex, highly contentious case that has placed great demands on plaintiffs' counsel. Because of the number of plaintiffs and defendants involved, the number of documents obtained and organized, and the complex legal and factual issues involved, we appreciate that plaintiffs' counsel and

their staffs had to spend considerable time and effort in coordinating the prosecution of this case. We are not persuaded by defendants' arguments that their expenditure of attorney and paralegal time on this case provides an accurate or "objective" gauge for measuring the reasonableness of the hours expended by plaintiffs' counsel. Nevertheless, we conclude that the hours spent by plaintiffs' counsel on this matter were not entirely reasonable and reductions from their lodestar figure must be made before considering any enhancement.

It is well established that plaintiffs cannot recover attorneys' fees from these defendants for hours that would not be billed to the client. *See Hensley v. Eckerhart*, 461 U.S. at 434. Defendants MONY and TWA charge that plaintiffs are attempting to recover fees for time expended exclusively on a related case, *Rowland v. Mutual of Life Insurance Company of New York, et. al*, No. C-1-87-0001 (S.D. Ohio). *Rowland*, another case before this Court, involved an individual plaintiff suing these same defendants under virtually identical facts and theories of recovery. That case, which proceeded to a summary jury trial in August of 1988, was settled prior to trial in September of 1988. Plaintiffs have included in their fee application for this case time which they claim was concomitantly spent on *Rowland* and this case. MONY advises that as many as 1025 hours of attorney time that appear on plaintiffs' time sheets were spent "obviously and solely" on the *Rowland* litigation. *See* doc. 188 at 5, n.2.

We recognize that plaintiffs' counsel may have treated the *Rowland* litigation as part of this case and that much of the discovery obtained in *Rowland* was used in this case. Additionally, a significant portion of settlement discussion and planning, no doubt, included consideration of global settlement of *Davis* and *Rowland*. However, upon our review of plaintiffs' itemization of hours expended, we note that numerous entries relate exclusively to the *Rowland* case, *e.g.*, time spent preparing for and during the summary jury trial, and time spent preparing or responding to motions that were unique to *Rowland*. Indeed, plaintiffs are including approximately 34 hours in attorney time for matters relating to

Bankruptcy Court filings and motions, presumably pertaining to the Rowlands; these were obviously not part of the *Davis* litigation. Plaintiffs are crediting, per prior agreement, $30,000 in fees for time spent on *Rowland* against the fees requested in this case. That is the equivalent of less than 4% of plaintiffs' lodestar figure. We find that a reduction from the lodestar in addition to the $30,000 credit is warranted for time spent on matters unrelated to this litigation as we have calculated that in excess of 625 hours in attorney time (16% of total attorney hours) were spent on matters unrelated to the *Davis* litigation. We presume that a similar pattern took place for paralegals as well. Accordingly, we reduce the plaintiffs' lodestar figure by 10%, leaving a product of $693,296.10. This figure does not include the aforesaid $30,000 credit, which we factor in below.

Our review of plaintiffs' time records is complicated by the fact that documentation is extremely sparse; frequent references to "legal research" and "trial preparation" and "conference with [co-counsel/paralegal]" without further explanation leave us with no guidance as to the reasonableness of the time expended. We concur in the defendants' observation that the records for Messrs. Blessing, Florez and Lierman reveal conflicting time spend when two or more of these attorneys were supposedly present for the same conference or telephone call.[3] We observed twenty such instances representing approximately over 50 hours of attorney time. Because there is no documentation that might explain these apparent discrepancies, we conclude that this suggests "padding" of some time entries, or at the very least, sloppy record keeping. Thus, based on these factors, we find that a further reduction of 10% is warranted for conflicting time

[3]For example, Mr. Lierman represents that he spent 3.5 hours in a conference with Mr. Blessing and Mr. Florez on 3/17/89 "regarding depositions;" Mr. Florez's records for that same day are unclear as to how much time was spent at this conference as he lists several activities for that day that consumed a total of 5.30 hours; Mr. Blessing's time records for that day show only a telephone call to Mr. Lierman (Mr. Blessing's meeting on that day was apparently with Mr. Florez and one of their clients and took less than 1 hour).

records and inadequate documentation. Our lodestar figure is now $623,296.10.

Moreover, these time records reflect some duplication of effort. We have observed, over our nearly three-year involvement with this case, that although Mr. Blessing has had the primary responsibility for presenting plaintiffs' position at hearings and pretrial conferences, one or more of the other principal attorneys has also been present. Although the state of these records exacerbate our difficulties in calculating duplication of effort with any precision, we think that it is appropriate to make an additional reduction of 10% for duplication. *See Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624, 637 (6th Cir. 1979), *cert. denied*, 447 U.S. (1980). The lodestar figure is now reduced to $561,569.84.

We think that it is appropriate to factor in the $30,000 credit, *see supra* at 7, at this point in our analysis so that the lodestar figure accurately reflects the reasonable hours expended by plaintiffs' counsel on *Davis*. This yields a lodestar of $531,569.84 based on the reasonable hours expended by plaintiffs' counsel in this matter.

2. The Reasonable Hourly Rate.

We cannot agree with the defendants that the hourly rates sought by these attorneys is excessive. Defendants note that the fees requested here are higher than those charged by these attorneys for other legal services and are higher than those sought in a similar case, *Myra L. Hofstetter v. Donald S. Fletcher et al.*, No. C-1-85-1616, (S.D. Ohio 1987) a case tried to a jury before the Honorable Carl B. Rubin, Jr. These arguments are not persuasive. We have no reason to question plaintiffs' counsel's representations that the hourly rates requested in this case reflect the complexity of the tax and fraud issues unique to *Davis* that distinguish the legal services rendered in this case from legal services rendered by counsel for other clients' matters. *See* Affidavits of Mr. Florez and Mr.

Lierman. We also think that a comparison between the rates charged in *Hofstetter* and those sought here is faulty because this case was factually and legally more complex than *Hofstetter*. *See* Doc 53 (Our Order denying plaintiffs' motion for partial summary judgment as to defendant Fletcher because of factual differences between *Hofstetter* and *Davis*).

We think that the caliber of representation on the part of plaintiffs' counsel was excellent throughout this litigation and the results obtained were impressive. As the rates sought are comparable to those approved in other complex cases in the United States District Court for the Southern District of Ohio, *see e.g., In re Dun & Bradstreet Credit Services Customer Litigation*, C-1-89-026 (S.D. Ohio), we conclude that plaintiffs' attorneys shall be compensated at the hourly rates sought. Thus, we shall not make any reductions in the lodestar figure based upon the hourly rates requested.

Based upon the foregoing analysis of the reasonable hours expended and the reasonable hourly rate for compensation of plaintiffs' attorneys, our lodestar figure is $531,569.84.

The Propriety of Applying a Fee Enhancement in this Case.

Plaintiffs' counsel contend that the lodestar figure should be enhanced by 75% (a multiplier of 1.75). The defendants counter that a multiplier is not appropriate in this case because the results were not "exceptional" as this case did not involve novel or complex legal or factual issues. *See Blum v. Stenson*, 465 U.S. 886, 901 (1984).

It would not be appropriate to apply a multiplier to the lodestar figure to compensate plaintiffs' counsel for the legal risks associated with this case, such as the novelty or complexity of the issues or the protracted nature of the litigation, as these factors are adequately reflected in the lodestar. *See Pennsylvania v. Delaware Valley Citizen's Counsel*, 107 S. Ct. 3078, 3089 (1987) (O'Connor,

J., Concurring). However, in appropriate cases, a multiplier may be applied to compensate for contingency in fee arrangements. *Conklin v. Lovely*, 834 F.2d 543, 553 (6th Cir. 1987) (interpreting *Delaware Valley, supra,*). An enhancement is only warranted when there is evidence that a multiplier is necessary to attract competent counsel "in the relevant community" to represent clients in such matters. *Delaware Valley*, 107 S. Ct. at 1090 (O'Connor, J., concurring); *see also Conklin, supra*. Our parent Circuit has also recently stated that the litigation's impact on a firm, especially a small firm, is also a relevant factor to consider in determining if a multiplier is proper. *Fite v. First Tennessee Production Credit Ass'n.*, 861 F.2d 884, 895 (6th Cir. 1988).

To this end, plaintiffs' counsel state by affidavit that the *Davis* litigation has had a great impact upon their small practices and that they have pursued this matter at great personal and professional expense: they have been forced to forego working on other clients' matters because of their concentrated efforts on behalf of these plaintiffs. Additionally, three attorneys from this community who are skilled in this area of consumer fraud litigation and who are knowledgeable about the availability of legal representation in Greater Cincinnati, have stated that in this community, the potential of a fee enhancement is necessary to attract competent counsel to accept such cases on a contingent fee basis. The defendants have not presented any evidence to the contrary.

We have no doubt that plaintiffs' counsel made many professional sacrifices to pursue this matter. We are convinced that these plaintiffs could not have pursued this litigation unless it was on a contingent fee basis. Based upon the evidence presented, we find that the plaintiffs would have experienced great difficulty obtaining competent counsel in the relevant market without the potential of a fee enhancement for the risks involved in undertaking such complex litigation on a contingent fee basis. Thus, we find that this is an appropriate case to apply a multiplier to the lodestar that we have calculated.

Of course, defendants also challenge the amount of a fee enhancement that should be applied in this case. *Delaware Valley, supra*, seems to teach that fees should be enhanced minimally -- only to the extent necessary to attract competent counsel -- and that a 33% enhancement is more than adequate for such purposes. *Delaware Valley*, 107 S. Ct. at 3089-91. Nevertheless, without any citation to *Delaware Valley*, the Sixth Circuit has endorsed a 75% multiplier in the context of an employment discrimination suit. *Fite* 861 F.2d at 895. *But see id.* at 798 (Wellford, J., dissenting) (citing *Delaware Valley* as only permitting a 33% enhancement).

We conclude that an enhancement of [75%] is reasonable under the facts and circumstances of this case and is sufficient to attract competent counsel to this kind of case, yet is not a "windfall" for the plaintiffs. Accordingly, we shall multiply the lodestar of $531,569.84 by 1.75, yielding a total attorneys' fee award of $930,247.22.

We realize that this figure is less than 35% of the total judgment (35% of $3,587,264 is $1,255,542.40), the amount which the plaintiffs are obligated to pay under their contingent fee contracts with counsel. Although the jury clearly indicated that the defendants should pay the contingent fee for the plaintiffs (the $518,040 awarded in fees by the jury was 35% of the $1,479,114 in damages awarded by the jury), we are also mindful that the jury wanted the plaintiffs to recover damages sufficient to "start from scratch" but did not want them to receive a windfall. The jury was unaware that a portion of the compensatory damages awarded would be trebled under RICO, thus did not know that even if the plaintiffs had to pay part of their damage award in attorney's fees, they would still be compensated more than adequately to "make them come out even with the IRS." Moreover, what plaintiffs may be bound to pay and what plaintiffs' counsel are free to collect under the fee agreements are not measured by the "reasonable attorney's fees" that defendants must under RICO and the Ohio Consumer Sales Practices Act. *See Venegas v. Mitchell*, No. 88-1725, slip op. at 7 (U.S., April 18 1990).

EXPENSES

The plaintiffs, as prevailing parties, seek reimbursement for certain out-of-pocket costs and expenses for this litigation pursuant to Fed. R. Civ. P. 54 and 28 U.S.C. §§ 1920, 1921. Plaintiffs' set forth their expenses on page 13 of the application (doc. 175) and in detail in the accompanying exhibits. *See* Doc. 176, Affidavit of William Blessing, Ex. D (Tab 1). The defendants have raised no objections to plaintiffs' application for reimbursement of costs and expenses.

We conclude that the expenses incurred herein were reasonable and necessary and are reimbursable under the applicable Rules and statutes. We shall award to plaintiffs counsel their total request for costs and expenses, $21,060.50.

Thus, plaintiffs counsel shall be awarded a total of $930,247.22 [enhanced attorney's fees + expenses] in attorneys' fees and expenses.

APPORTIONMENT

Plaintiffs contend that defendants' liability for the attorneys' fees and expenses is joint and several. Defendant MONY contends that the jury's apportionment of fees -- one fourth of the total to be paid by each defendant -- should be followed. Defendant TWA argues that it is not responsible for any attorneys' fees that are attributable to time and effort expended by the plaintiffs counsel on the claims for which TWA was not liable to the plaintiffs, especially the RICO claims.

We know of no precise way to segregate the time that plaintiffs spent exclusively on claims against each defendant because of the common facts and elements of proof. We think that the "rule of thumb" followed in this Circuit, to apportion damages among defendants based on proportionate liability, is the fairest way to ensure that each defendant contributes significantly in paying the

attorney's fees, yet is not compensating plaintiffs for legal service spent against another defendant or for claims upon which plaintiffs did not prevail. *See Marr v. Rife*, 545 F.2d 554, 556 (6th Cir. 1976).

Therefore, the defendants will be liable to the plaintiffs for attorneys' fees based upon each defendant's percentage of the total liability for damages as set forth in the Judgment (doc. 160).[4]

CONCLUSION

In light of the foregoing, plaintiffs' counsel are jointly awarded a total of $930,247.22 in attorneys' fees and expenses for their successful representation of the plaintiffs in this matter. Of this total award of fees and expenses, Defendant Donald S. Fletcher is liable for $874,432.38; Defendant Fletcher Insurance Associates is liable for $325,586.52; Defendant Mutual of New York is liable for $586,055.74; and Defendant Trans World Assurance is liable for $111,629.66.

SO ORDERED.

Dated: 8/9/90

/s/ S. ARTHUR SPIEGEL
United States District Judge

[4]The $3,394,225.00 in damages assessed against Donald S. Fletcher is 94% of the total judgment of $3,587,264.00; the $1,286,074.00 in damages assessed against Fletcher Insurance Associates is 35% of the judgment; the $2,280,034.66 assessed against Mutual of New York is 63% of the judgment; and the $439,072.50 assessed against Trans World Assurance is 12% of the judgment.

APPENDIX A

Law Office of William H. Blessing

Attorneys	Expended	Rate	Amount
W.H. Blessing	1676.25	$175.00	$ 293,343.75
M.B. Amarante	61.25	125.00	7,656.25
W.B. Markovits	2.25	165.00	371.25
L.M. Conradi	107.00	125.00	13,375.00
Subtotal	1846.75		314,764.25

Legal Assistants (Paralegals)

K.A. Olin	1097.25	$ 65.00	$ 71,321.25
B.A. Whalen	203.75	65.00	13,243.75
L.P. Proudfit	24.50	65.00	1,592.50
A.L. Baker	103.25	65.00	6,711.25
M.K. Heckle	64.00	65.00	4,160.00
T. Harvey	0.75	65.00	48.75
Subtotal	1493.50		$ 97,077.50

APPENDIX A
(Continued)

Investigator			
J.D. Morton	109.00	$ 50.00	$ 5,450.00
TOTAL for Offices of Wiliam H. Blessing			$ 417,273.75
Law Office of Michael G. Florez			
Attorney			
M.G. Florez	1168.90	$150.00	$ 175,335.00
Law Clerk			
C.L. Carson	233.70	$ 80.00	$ 18,696.00

APPENDIX A
(Continued)

Legal Assistant

L. Fay	57.00	$ 65.00	$ 3,705.00
TOTAL for Office of Michael G. Florez			$ 197,736.00

Dale O. Lierman Co., L.P.A.

Attorneys	Hours Expended	Rate	Amount
D.O. Lierman	801.50	$150.00	$ 120,225.00
J.G. Flaherty	26.50	125.00	3,312.50
Subtotal	828.00		123,537.50

APPENDIX A
(Continued)

Legal Assistants			
K.M. Staarman	398.45	$ 65.00	$ 25,899.25
M. Rutherford	171.25	65.00	11,131.25
Subtotal	569.70		37,030.50
TOTAL for Dale O. Lierman Co., LPA Offices			$ 160,568.00

Total for All Offices:

	Hours	Amount
Attorneys	3843.75	$ 613,636.75
Non-Attorneys	2403.90	$ 161,958.50
Court's Total Lodestar Calculation		$ 775,577.75
Plaintiffs' Total Lodestar Calculation		$ 770,329.00
Plaintiffs' Requested Multiplier		x 1.75
Less Rowland Credit		-$ 30,000.00
Plaintiffs' Net Attorneys' Fee Requested		$1,318,075.75

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EMMETT R. DAVIS, et al.,	:	No. C-1-87-0727
Plaintiffs,	:	
vs.	:	
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, et al,	:	CORRECTION OF ORDER AWARDING ATTORNEYS' FEES
	:	[Filed August 22, 1990]
Defendants.	:	

Pursuant to Rule 60, Fed. R. Civ. P. and its own motion, the court hereby orders the correction of a clerical mistake in its Order Awarding Attorneys' Fees (doc. 210).

The amount ordered by the court for total attorneys' fees is $930,247.22. The amount awarded for costs and expenses is $21,060.50. The total amount awarded, then, is $951,307.72. The third complete paragraph on page fourteen of the Order Setting Amounts for Supersedeas Bond should read, "Thus, plaintiffs' counsel shall be awarded a total of $951,307.72 [enhanced attorney's fees + expenses] in attorneys' fees and expenses."

Also, the first paragraph in the conclusion on page fifteen should read, "In light of the foregoing, plaintiffs' counsel are jointly awarded a total of $930,247.22 in attorneys' fees. Of this award of fees, Defendant Donald S. Fletcher is liable for $874,432.38; Defendant Fletcher Insurance Associates is liable for $325,586.52; Defendant Mutual of New York is liable for $586,055.74; and Defendant Trans World Assurance is liable for $111,629.66. Also,

plaintiffs' counsel is awarded $21,060.50 in expenses for their successful representation of the plaintiffs in this matter.

Further, disregard this court's order correcting the order setting amounts for supersedeas bond (doc. 212). The original order setting amounts for supersedeas bond (doc. 211) stands.

SO ORDERED.

Dated: August 21, 1990

/s/ S. ARTHUR SPIEGEL
United States District Judge

BITTNER, APPELLANT,
v.
TRI-COUNTY TOYOTA, INC., APPELLEE.

[Cite as Bittner v. Tri-County Toyota, Inc. (1991), 58 Ohio St. 3d 143.]

Consumer Sales Practices Act--Award of reasonable attorney fees pursuant to R.C. 1345.09(F)(2) by trial court determined, how--Trial judge must indicate basis for fee determination.

O.Jur 3d Consumer Protection § 8.

When awarding reasonable attorney fees pursuant to R.C. 1345.09(F)(2), the trial court should first calculate the number of hours reasonably expended on the case times an hourly fee, and then may modify that calculation by application of the factors listed in DR 2-106(B).

(No. 89-2009--Submitted November 27, 1990--Decided March 27, 1991.)

APPEAL from the Court of Appeals for Butler County, No. CA89-03-035.

This is an appeal from an award of attorney fees pursuant to R.C. 1345.09(F)(2) of the Consumer Sales Practices Act ("Act"), which provides, in pertinent part: "The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if *** [t]he supplier has knowingly committed an act or practice that violates this chapter." Whether the supplier "knowingly" violated the Act is not at issue in this case. The sole question presented for our review is whether the amount of

attorney fees was "reasonable." The underlying action that resulted in the award of attorney fees is as follows.

Plaintiff-appellant, Cheryl Bittner ("Bittner"), gave defendant-appellee, Tri-County Toyota, Inc. ("Tri-County"), a $1,000 deposit to apply toward her purchase of a Toyota Four Runner automobile. Bittner and Tri-County agreed upon a purchase price of $10,500. Later that same day, Tri-County sold the Toyota to a different purchaser for $11,500. Subsequently, Bittner bought another Toyota Four Runner.

On February 9, 1988, Bittner filed a complaint against Tri-County alleging that Tri-County's failure to give her a receipt for her deposit as required by Ohio Adm. Code 109:4-3-07 was a deceptive consumer sales practice under R.C. 1345.02. She also alleged Toyota breached its contract with her when it sold to another person the Toyota she intended to purchase. Tri-County denied that it violated the deposit rule or that it breached its contract with Bittner.

A few days before her trial was scheduled to begin, Bittner retained the services of Ronald Burdge, a consumer law lawyer. He worked with Bittner's general counsel, Carl Morgenstern Co., L.P.A., to identify and obtain specialized documents from Tri-County, and to try the case.

On the morning of trial, after eight months of protracted negotiations, Tri-County and Bittner agreed to settle for $3,500, exclusive of Bittner's attorney fees. As part of the settlement agreement, both sides agreed that the trial court would hear and determine the amount of the attorney-fee award.

Approximately one month after settlement, Bittner filed a motion for attorney fees, requesting $8,575 and $1,625 for Morgenstern and Burdge, respectively, and $726.38 and $85.60, respectively, for miscellaneous expenses. After conducting the hearing, the trial court judge awarded Morgenstern $6,500 in fees

plus $800 in expenses. Burdge was awarded $1,115 in fees plus $85 in expenses. The appellate court reversed, finding that the amount of attorney fees awarded was unconscionably high when compared to the amount of the settlement.

In reversing the trial court, the appellate court held that one of the most important factors to consider when determining the reasonableness of a fee award is the relationship of the fee award to the amount recovered. Upon remand, the appellate court directed the trial court to consider "whether the amount of fees requested could be reasonably charged to the client in the absence of a statutory provision for recovery of fees from the adversary."

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Carl Morgenstern Co., L.P.A., Barbara L. Morgenstern, Burdge Law Office and Ronald L. Burdge, for appellant.

Randy Blankenship and *Richard B. Uhle, Jr.*, for appellee.

Lee I. Fisher, attorney general, *Dianne Goss Paynter* and *Valerie A. Roller*, urging reversal for *amicus curiae*, Ohio Attorney General.

Kalpana Yalamanchili, urging reversal for *amicus curiae*, Ohio State Legal Services Association.

Spater, Gittes, Schulte & Kolman, Frederick M. Gittes and Kathaleen B. Schulte, urging reversal for *amici curiae*, Employment Lawyers' Association and National Lawyers Guild.

MOYER, C.J. At the outset, we reject the contention that the amount of attorney fees awarded pursuant to R.C. 1345.09(F) must bear a direct relationship to the dollar amount of the settlement, between the consumer and the supplier. The Act was amended in 1978 to include the payment of attorney fees "*** to prevent unfair,

deceptive, and unconscionable acts and practices, to provide strong and effective remedies, both public and private to assure that consumers will recover any damages caused by such acts and practices, and to eliminate any monetary incentives for suppliers to engage in such acts and practices." (137 Ohio Laws, Part II, 3219.)

In order for private citizens to obtain redress under the Act, they first must be able to obtain adequate legal representation. Private attorneys may be unwilling to accept consumer protection cases if the dollar amount they are permitted to bill their adversary is limited by the dollar amount of the recovery, especially since monetary damages in many instances under the Act are limited to $200. An attorney may expend inordinately large amounts of time and energy pursuing a claim that reaps relatively small monetary benefits for a prevailing plaintiff. We agree with the observation of the United States Supreme Court when it said: "A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious *** claims but relatively small potential damages to obtain redress from the courts." *Riverside v. Rivera* (1986), 477 U.S. 561, 578.

In addition to addressing an individual wrong, pursuing a claim under the Act may produce a benefit to the community generally. A judgment for the consumer in such a case may discourage violations of the Act by others. Prohibiting private attorneys from recovering for the time they expend on a consumer protection case undermines both the purpose and deterrent effect of the Act.

In determining whether the amount of the attorney-fee award is "reasonable," we first must look to the language of R.C. 1345.09(F)(2). The statute itself limits the fee award to work "reasonably performed." Thus, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which

to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart* (1983), 461 U.S. 424, 433.

In this case, Bittner's attorneys submitted well-documented time reports detailing the amount of time they spent preparing for trial. During the fee award hearing, both sides presented testimony regarding the number of hours worked and their hourly rates of recompense.

In challenging the amount of hours expended on the case, Tri-County alleges that the only issue in this case is whether it failed to give Bittner a receipt for her deposit, which, if proven, would subject it to payment of a $200 damage award. However, for seven months Tri-County denied it had violated any provision of the Act, even denying it had failed to give Bittner a receipt for her deposit. This, of course, required Bittner's attorneys to expend their time and resources to force Tri-County to admit it had violated the law. Importantly, the case was not settled until the morning of trial. The amount of the settlement was $3,500. Certainly, if the only issue to be litigated was whether Tri-County had failed to give Bittner a receipt for her deposit, Tri-County would not have agreed to a $3,500 settlement for a mere $200 technical violation of the Act.

"The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the *** court to adjust the fee upward or downward, including the important factor of 'results obtained.'" *Hensley, supra*, at 434. The consideration of "results obtained," however, is not synonymous with the monetary amount of the recovery. The results-obtained factor encompasses the degree of success enjoyed by the prevailing party. Here, Bittner enjoyed a high degree of success in the settlement of her claim.

Tri-County also alleges that Bittner should not be able to recover for the time spend developing her breach of contract claim, since a breach of contract, standing alone, is not unfair or deceptive under the Act. In this case, the breach of contract claim is distinct

from the deposit rule claim. Where, as here, the claims can be separated into a claim for which fees are recoverable and a claim for which no fees are recoverable, the trial court must award fees only for the amount of time spend pursuing the claim for which fees may be awarded. See *Hensley, supra.*

When awarding reasonable attorney fees pursuant to R.C. 1345.09(F)(2), the trial court should first calculate the number of hours reasonably expended on the case times an hourly fee, and then may modify that calculation by application of the factors listed in DR 2-106(B). These factors are: the time and labor involved in maintaining the litigation; the novelty and difficulty of the questions involved; the professional skill required to perform the necessary legal services; the attorney's inability to accept other cases; the fee customarily charged; the amount involved and the results obtained; any necessary time limitations; the nature and length of the attorney/client relationship; the experience, reputation, and ability of the attorney; and whether the fee is fixed or contingent. All factors may not be applicable in all cases and the trial court has the discretion to determine which factors to apply, and in what manner that application will affect the initial calculation.

Moreover, the trial court determination should not be reversed absent a showing that the court abused its discretion. "It is well settled that where a court is empowered to award attorney fees by statute, the amount of such fees is within the sound discretion of the trial court. Unless the amount of fees determined is so high or so low as to shock the conscience, an appellate court will not interfere. The trial judge which participated not only in the trial but also in many of the preliminary proceedings leading up to the trial has an infinitely better opportunity to determine the value of services rendered by lawyers who have tried a case before him than does an appellate court." *Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc.* (1985), 23 Ohio App.3d 85, 91, 23 OBR 150, 155, 491 N.E.2d 345, 351-352.

The trial court judge was in the best position to assess and review the time records submitted by Bittner's attorneys. The trial judge had been involved in the pretrial proceedings and was aware of the posture of both Bittner and Tri-County.

In making the fee award determination, the trial judge did not award either of Bittner's attorneys the fee amount requested. Thus, in making its final determination, the trial court apparently took into consideration other factors. Presumably, sufficient evidence was presented to support the award made by the trial judge. However, it is not possible to determine what factors the court considered or the weight, if any, it placed on those factors. When making a fee award pursuant to R.C. 1345.09(F)(2), the trial court must state the basis for the fee determination. Absent such a statement, it is not possible for an appellate court to conduct a meaningful review.

For the foregoing reasons, we reverse the judgment of the court of appeals and remand the cause to the trial court for disposition consistent with this opinion. the trial court may, in its discretion, apply the tests stated herein to the facts in the record.

Judgment reversed
and cause remanded.

HOLMES, WRIGHT and H. BROWN, JJ., concur.

SWEENEY, DOUGLAS and RESNICK, JJ., concur in part and dissent in part.

DOUGLAS, J., concurring in part and dissenting in part. I concur in the opinion and judgment of the majority with regard to the awarding of attorney fees pursuant to R.C. 1345.09(F)(2). I respectfully dissent from the majority's remand to the trial court for a statement of the basis for its fee determination. I would reinstate the judgment of the trial court, which obviously followed the law as it has been previously set down.

The majority quotes from *Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc.* (1985), 23 Ohio App.3d 85, 91, 23 OBR 150, 155, 491 N.E. 2d 345, 351-352, which sets forth the proper standard for determining fees and the proper standard of appellate review of a trial court's judgment in such a case. Certainly the fees awarded by the trial judge in this case are not "*** so high or so low as to shock the conscience ***." Therefore, the judgment of the trial court should not be disturbed. That judgment should be reinstated.

SWEENEY and RESNICK, JJ., concur in the foregoing opinion.

CHARLES AND MAUDIE FREEMAN, Plaintiffs-Appellees v. CROWN CITY MINING, INC., Defendant-Appellant

Freeman v. Crown City Mining, Inc.

Case No. 92CA41

COURT OF APPEALS OF OHIO, FOURTH APPELLATE DISTRICT, GALLIA COUNTY

1993 Ohio App. LEXIS 5062
September 29, 1993, Entered

DISPOSITION: JUDGMENT AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

COUNSEL: Fosson, Mann & Preston, James L. Mann, Chillicothe, Ohio, for Appellant.

Sowash, Carson & Shostak, Robert J. Shostak, Athens, Ohio, for Appellees.

JUDGES: Harsha, Abele, Stephenson

OPINION BY: FOR THE COURT; WILLIAM H. HARSHA

OPINION: DECISION AND JUDGMENT ENTRY

Harsha, P.J.:

Crown City Mining, Inc., appeals from a judgment entered by the Gallia County Court of Common Pleas awarding Charles and Maudie Freeman $60,252.14 in attorney and expert fees in connection with the determination that Crown City Mining, Inc. had violated Ohio mining and water pollution laws.

Appellant assigns the following errors:

I. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY FAILING TO LIMIT ATTORNEY FEES TO THOSE BILLABLE HOURS WHICH WERE REASONABLY EXPENDED ON THE LITIGATION.

II. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY CALCULATING ATTORNEY FEES AT AN HOURLY RATE WHICH WAS EXCESSIVE FOR THE PREVAILING MARKET RATES IN THE RELEVANT COMMUNITY.

III. THE TRIAL [*2] COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT IN AWARDING EXCESSIVE AMOUNTS OF ATTORNEY FEES WHICH WERE NOT CALCULATED IN ACCORDANCE WITH APPLICABLE LAW.

IV. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY AWARDING AN ENHANCEMENT OF THE ATTORNEY FEES CLAIMED IN THE AMOUNT OF $16,765.00.

V. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY AWARDING EXPERT FEES WHICH WERE NOT RELATED TO THE MATTER IN LITIGATION.

VI. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY AWARDING EXPERT FEES WHICH INCLUDED THE TIME FOR EXPERTS TO REMAIN AT TRIAL AFTER THEY HAD TESTIFIED TO ACT AS CONSULTANTS TO THE PLAINTIFFS' COUNSEL.

The Freemans (appellees) filed a complaint against Crown City Mining, Inc. (appellant) which alleged that Crown City's strip mining operation caused a spring located on the Freemans' property to become contaminated with various pollutants. Appellees' amended complaint set forth claims for relief based upon intentional trespass, nuisance, nuisance per se, negligence, negligence per se, and [*3] violations of the Ohio Coal Strip Mine Land Reclamation Act (R.C. Chapter 1513). They sought damages and injunctive relief, as well as attorney and expert witness fees pursuant to R.C. 1513.15(H). Appellant filed an answer denying the allegations in the complaint.

Appellees filed a motion or partial summary judgment, asserting that the factual issue of whether appellant's activities had caused the contamination of their spring had been previously resolved in appellees' favor by the Ohio Reclamation Board of Review. The trial court agreed and granted appellees' motion, holding that appellant was collaterally estopped from relitigating the causation issue. However, the trial court also granted appellant's cross-motion for partial summary judgment concerning any statutory violations asserted by appellees which the Reclamation Board of Review had already determined did not occur. As a result of the latter ruling, appellees dismissed one of their statutory violation claims.

After a trial on the remaining issues, the jury determined that appellees were entitled to $75,000 in compensatory damages. In its answers to interrogatories, the jury determined that: (1) appellant violated Ohio's [*4] mining and water pollution laws; (2) as a result of appellant's violation of Ohio law, appellees incurred damages; and (3) appellant had failed to properly reclaim appellees' spring. On September 2, 1992, the trial court entered a judgment on the jury verdict in favor of appellees in the amount of $75,000.

Shortly thereafter, appellees filed a petition for an award of attorney and expert witness fees pursuant to R.C. 1513.15(H). The petition requested $33,530.50 in attorney fees, $16,765 for a "public interest or risk enhancement multiplier," $1,182.53 for expenses, and

$6,738.11 for expert fees. Attached to the petition was a detailed billing worksheet of the time spent by the attorney and paralegals on different tasks involved in the action. Also attached were invoices of four experts. Affidavits and attached resumes of appellees' counsel, Robert J. Shostak and Jeffrey A. Kodish, indicated that the number of hours spent representing appellees and the other costs and expenses were "reasonable considering the complexity of the case." The affidavits and itemized statement indicated that Shostak's rate for environmental litigation was $150-175 per hour during the proceedings [*5] below and that Kodish's rate was $60-75 per hour.[1] Shostak and Kodish's affidavits noted that these rates were comparable to, or less than, the amount charged by environmental lawyers throughout Ohio with similar experience.

The fee petition included affidavits of three other attorneys, one of them noting that his hourly rate was $170 per hour and that such rate was equal to or less than the amount charged by lawyers with similar experience employed at firms which represent parties in coal mine litigation in Ohio. Another attorney, Stephen P. Samuels, opined that a reasonable range of hourly rates for attorneys with comparable experience to Shostak who concentrate their practice in environmental litigation in medium to large law firms in Ohio would be $210-$240 per hour. Appellees later filed an amendment to their petition [*6] which requested an additional $1,511 for expert expenses.

Appellant filed a memorandum in opposition to the fee petition which asserted: (1) the hourly rate utilized by Shostak was grossly in excess of the hourly rate for skilled trial counsel in the relevant community; (2) over $6,500 of the billing by Shostak and Kodish was duplicative; (3) the attorney fees should be reduced because appellees only succeeded on a portion of their claims; (4)

---

[1]Kodish's affidavit erroneously listed his hourly rate as $150-$175 per hour. However, the itemized statement and appellees' petition utilized his actual $60-$75 per hour rate.

one expert should not be reimbursed because his billing was not related to appellees' case; (5) one expert expended a portion of his time on a well complaint that was not related to the case; and (6) the two experts who testified at trial should not have charged for time spent at trial in which they did not testify. Attached to appellant's memorandum was an affidavit of its attorney, James L. Mann, who stated that the usual and customary hourly rates for experienced trial litigators in the area ranged from $75 to $100 per hour. In another affidavit, attorney Steven T. Sloan of Athens, Ohio, stated that the customary rates for Gallia County were $75 to $125 per hour. Appellees subsequently filed a reply to appellant's memorandum.

On November [*7] 5, 1992, the trial court awarded appellees $60,252.14 in attorney and expert fees which consisted of:

Attorney Fees	$33,530.50
Enhancement (1.5 multiplier)	16,765.00
Expenses	1,182.53
Expert Fees	8,249.11
Fee Petition Work	525.00
TOTAL	$60,252.14

The trial court expressly determined that Shostak's hourly rate of $175 was reasonable and that enhancement by a multiplier was warranted because "the case was severely hampered by the prior binding factual rulings of the Reclamation Board of Review," the "unclear state of the law," and appellees' "noteworthy" success. An entry nunc pro tunc was subsequently filed by the trial court which journalized the court's overruling of appellees' pending motion for prejudgment interest.

Appellant's first, second, and third assignments of error assert that the trial court abused its discretion by: (1) failing to limit attorney fees to those billable hours which were reasonably expended on the litigation; (2) calculating attorney fees at an hourly rate which was excessive for the prevailing market rates in the relevant community; and (3) awarding excessive amounts of attorney fees

which were not calculated in [*8] accordance with applicable law. We will consider these assignments of error jointly.

As a general rule, the costs and expenses of litigation, other than usual court costs, are not recoverable in actions for damages; ordinarily no attorney fees are allowed. Vinci v. Ceraolo (1992), 79 Ohio App.3d 640, 649, 607 N.E.2d 1079, citing Gustafson v. Cotco Enter. (1974), 42 Ohio App.2d 45, 52, 328 N.E.2d 409. Under this "American rule," attorney fees are generally not recoverable by the prevailing party in the absence of statutory authorization. State ex rel. Butterbaugh v. Ross Cty. Bd. of Commrs. (1992), 79 Ohio App.3d 826, 837, 608 N.E.2d 778; Washington Cty. Ag. & Mech. Assn. v. T.H.E. Insurance Co. (Dec. 22, 1992), 1992 Ohio App. LEXIS 6535, Washington App. Nos. 92CA4 and 92CA13, unreported, p. 23; Vinci, supra. Here, the trial court awarded appellees attorney fees pursuant to R.C. 1513.15(H), which provides:

Any person who is injured in his person or property through the violation by any operator of any rule, requirement, order or permit issued pursuant to Chapter 1513. of the Revised Code may bring an action for damages, including [*9] reasonable attorney's and expert witness fees, in the court of common pleas of Franklin county or in the court of common pleas of the county in which the coal mining operation complained of is located.

Normally, where attorney fees are authorized by statute, the entitlement to and the amount of an award lies within the sound discretion of the trial court. Meacham v. Miller (1992), 79 Ohio App.2d 35, 42, 606 N.E.2d 996; Yarber v. Cooper (1988), 61 Ohio App.3d 609, 613, 573 N.E.2d 713; see, also, Smith v. Padgett (1987), 32 Ohio St.3d 344, 513 N.E.2d 737. The determination by a trial court of the appropriate amount of an attorney fee award will not be reversed on appeal unless it is an abuse of discretion. Lacare v. Dearing (1991), 73 Ohio App.3d 238, 241, 596 N.E.2d 1097; Meacham, supra. An abuse of discretion involves more than an error of judgment; it connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary. Franklin Cty.

Sheriff's Dept. v. State Emp. Relations Bd. (1992), 63 Ohio St.3d 498, 506, 589 N.E.2d 24; Wilmington Steel Products, Inc. v. Cleve. Elec. Illum. Co. (1991), 60 Ohio St.3d 120, 122, 573 N.E.2d 622. [*10] When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court. In re Jane Doe 1 (1991), 57 Ohio St.3d 135, 138, 566 N.E.2d 1181, citing Berk v. Matthews (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

The parties and the trial court applied the following analysis in computing a reasonable attorney fee:

The first step in the analysis necessitates the calculation of the "lodestar" figure. Akron Center for Reproductive Health v. Akron (N.D.Ohio 1985), 604 F.Supp. 1275, 1284. See 651 F.2d 1198 (C.A.6, 1981). The lodestar is determined by multiplying the reasonable hours expended on the litigation by the reasonable hourly rate for attorneys or paraprofessionals. Hensley, 461 U.S. at 433, 103 S.Ct. at 1939, 76 L.Ed.2d at 50; Blum v. Stenson (1984), 465 U.S. 886, 888, 104 S.Ct. 1541, 1543, 79 L.Ed.2d 891, 895. However, in calculating the lodestar the court should exclude any hours which were unreasonably expended. Hensley, 461 U.S. at 434, 103 S.Ct. at 1939, 76 L.Ed.2d at 50. [*11] Unreasonably expended hours are generally categorized as those which are excessive in relationship to the work done, are duplicative or redundant, or are simply unnecessary. Id. Further, the hours expended must be documented and that documentation must reflect billing practices employed in the private sector. Id. In other words, a prevailing party cannot, under Section 1988, include hours or items as chargeable to his adversary which would not be billable to a private client. Finally, the reasonableness of the fee charged is determined by comparison to prevailing market rates in the relevant community. Blum, supra, 465 U.S. at 895, 104 S.Ct. at 1547, 79 L.Ed.2d at 899. After calculating the lodestar, the court may, in consideration of other factors, enhance or reduce the lodestar. Blum, supra, at 898-899, 104 S.Ct. at 15, 79 L.Ed.2d at 1548-1549.

Gibney v. Toledo Bd. of Edn. (1991), 73 Ohio App.3d 99, 108-109, 596 N.E.2d 591. Ohio courts that have applied the "lodestar" analysis have invariable done so only where the prevailing party [*12] brought a federal constitutional claim, normally in a civil rights context, and prevailed on either that claim or a state law claim which shared a common nucleus of operative fact with the federal claim. Cincinnati ex rel. Kuntz v. Cincinnati (1992), 79 Ohio App.3d 86, 94-96, 606 N.E.2d 1028; Fenton v. Query (1992), 78 Ohio App.3d 731, 737-739, 605 N.E.2d 1303; Doe v. Cuddy (1985), 21 Ohio App.3d 270, 487 N.E.2d 914; Gibney, supra. Appellees did not assert any federal claim, constitutional or otherwise, in this action. Instead, appellees' claims were based solely on state law. However, since the parties were in agreement, we see no reason to question its applicability here.[2]

---

[2]In Bittner v. Tri-County Toyota, Inc. (1991), 58 Ohio St.3d 143, 569 N.E.2d 464, the Supreme Court of Ohio held at the syllabus that when awarding reasonable attorney fees pursuant to R.C. 1345.09(F)(2) of the Consumer Sales Practices Act, the trial court should first calculate the number of hours reasonably expended on the case times an hourly fee, and then may modify that calculation by application of the factors listed in DR 2-106(B). DR 2-106(B) specifies the following factors as guides in determining the reasonableness of an attorney fee:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

[*13]

Appellant initially contends that the hours billed by Shostak and Kodish were not reasonable because many of their charges were duplicative, i.e., both attorneys billed for consultations they had with each other pertaining to the case. Courts have frequently pointed out that time spent in doing the work is not a controlling factor in assessing the value of the services; the time must be fairly and properly used. I Speiser, Attorneys' Fees (1973) 308, Section 8.6. A lawyer basing his fee on the hours expended may not employ wasteful procedures in an effort to increase the number of billable hours. Rotunda, Professional Responsibility (2 Ed. 1988) 89, T IV(A)(1). Unnecessary and duplicative efforts by counsel should not be utilized in calculating reasonable hours. See, e.g., Zimmie v. Zimmie (Feb. 3, 1983), Cuyahoga App. Nos. 43299, 44803, and 44804, unreported.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

---

(8) Whether the fee is fixed or contingent.

Ohio courts have consistently utilized these factors in determining the reasonableness issue. Villella v. Waikem Motors, Inc. (1989), 45 Ohio St.3d 36, 41, 543 N.E.2d 464; Hockenberry v. Hockenberry (1992), 75 Ohio App.3d 806, 810, 600 N.E.2d 839. Attorney fee awards must be reasonable in light of the pertinent Disciplinary Rule provisions. Meacham, supra, at 42. The determination of an award must be predicated upon evidence adduced by the parties. Yarber, supra, at 614. Bittner has since been applied by Ohio courts in cases involving judicial computation of reasonable attorney fees, even where the case does not involve the Consumer Sales Practices Act. Gerhardt v. Mid America Mortgage Corp. (Mar. 5, 1993), Pickaway App. No. 92CA14, unreported; Suiter v. Walker (July 21, 1992), 1992 Ohio App. LEXIS 3870, Lawrence App. No. 91CA13, unreported; Day v. Day (May 14, 1991), 1991 Ohio App. LEXIS 2325, Franklin App. No. 90AP-745, unreported.

As noted by appellant, the federal appellate court in Copeland v. Marshall (C.A.D.C. 1980), 205 U.S. App. D.C. 390, 641 F.2d 880, stated at p. 891 (emphasis sic):

> Compiling raw totals of hours spent, however, does not complete the inquiry. It does not follow that the amount of time actually expended is [*14] the amount of time reasonably expended. In the private sector, "billing judgment" is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority. Thus, no compensation is due for nonproductive time. For example, where three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time.

See, also, COAL v. Division of Reclamation (Jan. 31, 1989), Meigs App. No. 416, unreported (Stephenson, J., dissenting).

However, as appellees assert, prevailing parties are not necessarily barred from fees for the presence of a second attorney or hours spent by collaborating attorneys. See, e.g., New York State Assn. for Retarded Children v. Carey (C.A.2, 1983), 711 F.2d 1136, 1146. We agree with appellees that the trial court could have reasonably concluded that the conferences between Shostak and Kodish actually lowered the amount of attorney fees because it increased Kodish's involvement and lessened Shostak's time on the case, with Shostak's hourly rate being [*15] $100 greater than Kodish's. It could additionally conclude that the billing was reasonable and not duplicative. Therefore, the trial court did not abuse its discretion in failing to strike the challenged hours as duplicative.[3]

[3]An evidentiary hearing might have further clarified the attorney fees computation but appellant neither requested one below nor asserts any error because of the failure of the trial court to hold one on appeal.

Appellant next contends that Shostak's rates of $150 per hour until January 1, 1992 and $175 per hour thereafter were excessive for the prevailing market rates in the relevant community. The fee customarily charged in the locality for similar services is a pertinent factor in determining the reasonableness of the fee. See by analogy DR 2-106(B)(3); Rotunda, supra, at 89, T IV (A)(1). However, custom and prevailing rates are by no means conclusive, and may be disregarded where the litigation is highly specialized. Speiser, supra, at 326-327, Section 8.13. Furthermore, the [*16] attorney's standing in the profession for learning, ability, skill, and integrity is recognized as a proper matter for consideration in assessing the value of his services. Id. at 311, Section 8.8; see, also, DR 2-106(B)(7). The materials filed by appellees in support of their fee petition indicated that Shostak specialized in environmental litigation and possessed recognized skill and expertise in that area. Affidavits of attorneys with similar experience indicated that his hourly rates were reasonable. The trial court could properly have accorded more weight to the affidavits filed by appellees than those filed by appellant. The trial court did not abuse its discretion in determining that Shostak's hourly rates were reasonable, i.e., that they were comparable to fees customarily charged by attorneys with similar experience in the pertinent community.

Appellant further contends that the amount awarded for attorney fees was excessive where appellees only succeeded on a portion of their claims. The results obtained are pertinent considerations in determining the reasonableness of the fee. See DR 2-106(B)(4); Fenton v. Query (1992), 78 Ohio App.3d 731, 739, 605 N.E.2d 1304. [*17] However, the final result in a case is not always the test of an attorney's right to payment for his services. Speiser, supra, at 323, Section 8.11. It is somewhat disconcerting that appellees failed to specifically address this contention of appellant either below or on appeal. However, we are persuaded that a review of all the relevant circumstances before the trial court supports its approval of appellees' requested fees prior to enhancement. Certainly, appellant is correct in its assertion that appellees only recovered a portion of damages sought and failed to

recover on many of their claims. However, there is no record indicating that the unsuccessful claims necessitated additional billable time beyond that needed for those upon which they succeeded. More importantly, the trial court could have appropriately considered the other pertinent factors, i.e., difficulty of litigation, to offset any perceived noncompensable hours spent on the non-meritorious claims. The consideration of "results obtained" is not synonymous with the monetary amount of the recovery; it encompasses the degree of success enjoyed by the prevailing party. Bittner, supra, at 145; [*18] Cyrus v. Journey (Mar. 11, 1992), 1992 Ohio App. LEXIS 1223, Scioto App. No. 91CA1988, unreported. Appellees arguably achieved a high degree of success here. We discern no abuse of discretion on the part of the trial court in failing to reduce the award based upon the results obtained by appellees' counsel. Appellant's first, second, and third assignments of error are overruled.

Appellant's fourth assignment of error asserts that the trial court abused its discretion in awarding an enhancement of $16,765 to the reasonable fee award. Courts have allowed enhancement of the fee award in cases involving enforcement of federal claims or state claims which share a common nucleus of operative fact with asserted federal claims. Hensley v. Eckerhart (1982), 461 U.S. 424, 435; Gibney, supra; Doe, supra. Furthermore, the Supreme Court of Ohio in Bittner at p. 145 citing Hensley, appeared to recognize that "the product of reasonable hours times a reasonable rate does not end the inquiry" and that "there remain other considerations that may lead the *** court to adjust the fee upward or downward ***." However, the [*19] Bittner syllabus, taken literally, does not expressly recognize any further "enhancement" following application of the DR 2-106(B) factors and does not address the propriety of an enhancement multiplier. Indeed, the predicate of "exceptional success" in enhancement cases involving federal claims is already subsumed in the "results obtained" factor in DR 2-106(B)(4).

Assuming, arguendo, that enhancement of the reasonable fee computation is allowable in Ohio where purely state law claims are involved, Hensley states as p. 435:

Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. -

See, also, Blum v. Stenson (1984), 465 U.S. 886, 901. As noted previously, since acknowledgment of the "results obtained" generally is already contained in the determination to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award. Id. at 900. [*20]

The trial court determined that use of the enhancement multiplier was warranted because appellees were "severely hampered" by prior binding factual findings of the Reclamation Board of Review, the unclear state of the law, and their success was "noteworthy." However, as appellant notes, appellant was likewise hampered by the prior Reclamation Board of Review finding that it had caused the contamination of appellees' spring. The trial court apparently granted the enhancement because of the purported difficulty of establishing the merits of appellees' case. Appellees contended in their reply memorandum during the proceedings below that "given the significant risk of nonpayment, a risk multiplier is appropriate in this case to encourage, as a matter of public policy, cases arising from violations of mining and pollution laws."

In Burlington v. Dague (1992), 505 U.S. , 120 L.Ed.2d 449, the Supreme Court of the United States held that enhancement of attorney fees above the "lodestar" to reflect a contingent fee agreement is not permitted in attorney fee awards under federal environmental fee-shifting statutes. The Burlington court stated at p. [*21] 456-457:

We note at the outset that an enhancement for contingency would likely duplicate in substantial part factors already subsumed in the lodestar. The risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits. The second factor, however, is ordinarily reflected in the lodestar - either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so. Blum, supra, at 898-899, 79 L.Ed.2d 891, 104 S.Ct. 1541. Taking account of it again through lodestar enhancement amounts to double-counting. Delaware Valley II, 483 U.S., at 726-727, 97 L.E.2d 585, 107 S.Ct. 3078 (plurality opinion).

The first factor (relative merits of the claim) is not reflected in the lodestar, but there are good reasons why it should play no part in the calculation of the award. It is, of course, a factor that always exists (no claim has a 100% chance of [*22] success), so that computation of the lodestar would never end the court's inquiry in contingent-fee cases. See id., at 740, 97 L.Ed.2d 585, 107 S.Ct. 3078 (Blackmun, J., dissenting). Moreover, the consequence of awarding contingency enhancement to take account of this "merits" factor would be to provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones. Assume, for example, two claims, one with underlying merit of 20%, the other of 80%. Absent any contingency enhancement, a contingent-fee attorney would prefer to take the latter, since he is four times more likely to be paid. But with a contingency enhancement, this preference will disappear: the enhancement of the 20% claim would be a multiplier of 5 (100/20), which is quadruple the 1.25 multiplier (100/80) that would attach to the 80% claim. Thus, enhancement for the contingency risk posed by each case would encourage meritorious claims to be brought, but only at the social cost of indiscriminately encouraging nonmeritorious claims to be brought as well. We think that an unlikely objective of the "reasonable fees" provisions. [*23] "These statues were not designed as a form of economic relief to improve the financial lot

of lawyers." Delaware Valley I, 478 U.S., at 565, 92 L.Ed.2d 439, 106 S.Ct. 3088.

Analogously, assuming that enhancement is allowable for violations of Ohio law with no concomitant federal claim, we are persuaded that, as a matter of law, appellees failed to establish the level of "exceptional success" required by Hensley and Blum to warrant enhancement. More particularly, the factors relied upon by appellees and the trial court, i.e., the difficulty of establishing the merits, were already subsumed in the computation of the "lodestar." Burlington, supra. Therefore, the trial court abused its discretion in awarding the 50% enhancement in the attorney fee award. Appellant's fourth assignment of error is sustained.

Appellant's fifth assignment of error asserts that the trial court abused its discretion by awarding expert fees which were not related to the matter in litigation. Appellant objected to the $457 invoice of geologist Eberhard Werner and the $1,582.65 invoice of geologist Richard S. [*24] diPretoro on the basis that all of Werner's and most of diPretoro's billings were not related to the case.

Without statutory authorization, a trial court should not tax an expert's fee as costs to be paid by the losing party. Moore v. General Motors Corp. (1985), 18 Ohio St.3d 259, 260, 480 N.E.2d 1101; see, also, Howard v. Wills (1991), 77 Ohio App.3d 133, 138-139, 601 N.E.2d 515; Gnepper v. Beegle (Dec. 1992), 84 Ohio App.3d 259, 616 N.E.2d 960, unreported. Here, R.C. 1513.15(H) specifically provides for recovery of "expert witness fees." We initially note that appellant does not claim that expert fees are not available to prevailing plaintiffs pursuant to R.C. 1513.15(H) where those experts do not testify, i.e., are not "witnesses." Rather, appellant's fifth assignment of error only contends that the challenged fees were not recoverable because they were "not related" to the case. Consequently, we need not resolve the issue of whether the challenged fees were improper because R.C. 1513.15(H) only envisions reimbursement for "expert witness fees."

Appellant claims Werner's fees were not related to the litigation since he did not testify at trial [*25] and did not have his samples or tests introduced into evidence. Appellees contend that Werner's samples and tests were relied upon by their experts who testified at trial. Since appellant failed to order any transcript of the jury trial, we presume that the trial court had sufficient information before it to support a determination that Werner's fees were related to the case.

Appellant further asserts that much of diPretoro's work was spent on an unrelated well complaint. However, as stated by appellees, both below and on appeal, appellees' fee petition expressly reduced diPretoro's fees by $50 for the time spent on the well complaint issue. The trial court did not abuse its discretion in rejecting appellant's argument that Werner and diPretoro's expenses were not related to the case. Appellant's fifth assignment of error is overruled.

Appellant's sixth assignment of error asserts that the trial court abused its discretion by awarding expert fees which included the time for experts to remain at trial to act as consultants at trial after they had testified. Appellant challenges only those portions of EEI Geophysical and Gary D. Storrick's invoices which included $1,000 each for [*26] expert witness testimony and not their expenses related to preparation for trial.

As noted by appellees, experts can serve vital interests by remaining present at trial following testimony, e.g., availability for rebuttal testimony in addition to acting in a consulting capacity. Therefore, in the absence of any cited authority to the contrary, we are not persuaded that the trial court abused its discretion in allowing these expert fees. Appellant's sixth assignment of error is overruled.

Accordingly, in that we have sustained appellant's fourth assignment of error, we reverse that portion of the judgment awarding appellees a $16,765 enhancement of their attorney fees and

remand to the trial court for entry of a judgment in accordance with this opinion. In all other respects, the judgment is affirmed.

JUDGMENT AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED IN PART AND REVERSED IN PART and remanded to the trial court for further proceedings consistent with this opinion and that costs herein be taxed equally between Appellant and Appellees.

The Court finds there were reasonable grounds for this appeal.

It is ordered [*27] that a special mandate issue out of this Court directing the Gallia County Common Please Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J. and Stephenson, J.: Concur in Judgment and Opinion.

For the Court

BY: William H. Harsha, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule N. 11, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

WILLIAM D. HALL, Plaintiff-Appellant v.
DALE H. LACHETA, Defendant-Appelee

Hall v. Lacheta

Case No. 92AP020013

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, TUSCARAWAS COUNTY

1992 Ohio App. LEXIS 5945

November 18 1992, Entered

PRIOR HISTORY: CHARACTER OF PROCEEDING: Civil Appeal from Common Pleas Court, Case No. 90-CV-090286

DISPOSITION: JUDGMENT: Reversed and Remanded

HEADNOTES: ATTORNEY FEES

COUNSEL: For Plaintiff-Appellant: DEBORAH GILBERT, 131 Fair Ave. N.E., New Philadelphia, OH 44663.

For Defendant-Appellee: DALE LACHETA, Pro Se, 223 Springbrook Dr. S.E., New Philadelphia, OH 44663.

JUDGES: Hon. W. Scott Gwin, P.J., Hon Irene B. Smart, J., Hon. William G. Hoffman, J.

OPINION BY: WILLIAM B. HOFFMAN

OPINION: OPINION

HOFFMAN, J.

Plaintiff-appellant is William D. Hall and Dale H. Lacheta is defendant-appellee. Appellee has failed to file a brief in this matter and we avail ourselves of App.R. 18(C), Consequence of failure to file briefs, in that we will accept the appellant's statement of the facts as correct.

Appellant rented an apartment from appellee. On or about August 15, 1990, appellee informed appellant to vacate the apartment by the end of the month or by physically evicted. Appellant contacted southeastern Ohio Legal Services which sent appellee a letter (on or about August 23, 1990) explaining his (Lacheta's) limitations under R.C. 5321.15. [*2] On September 1, 1990, appellee came to the apartment unannounced and found appellant in the yard. Appellee informed appellant to prepare the apartment for another tenant and appellant responded he was not moving because he had not received any court order of eviction. Appellant entered his apartment, locked the door and did not answer when appellee began knocking on it. Appellee forced the door open and broke the latch. He entered the apartment and began cleaning it while appellant called the police who initially refused to respond. After appellant contacted Legal Services, police eventually arrived to investigate the altercation. Police informed appellee that he could be arrested for trespassing at which time appellee apparently held up his wrists offering to be handcuffed. Appellee eventually agreed to leave the apartment at which time he informed appellant that there would be a rent increase. Later that same afternoon, appellee returned to the apartment and erected a yellow sign two feet high and three feet wide in front of the building which read:

YOUR TAX DOLLARS AT WORK!! "BILL HALL" OWED 3 MO. RENT. HE WON'T PAY OR LEAVE. HE GETS WELFARE, A LAWYER AND POLICE [*3] PROTECTION. IS THIS HOW YOU WANT YOUR MONEY SPENT?! TELL BILL HOW YOU FEEL. TELL YOUR CONGRESSMAN HOW YOU FEEL.

On September 3, 1990, appellant commenced an action in the Court of Common Pleas of Tuscarawas County, by filing a complaint and motion for temporary restraining order. The court issued the TRO and subsequently issued a preliminary injunction against appellee. After a jury trial on the merits, the jury rendered a verdict in favor of appellant awarding him $500 in compensatory damages for appellee's violations of the Landlord Tenant Act and $2,500 for compensatory damages on invasion of privacy. By agreement of the parties appellee was allowed a set-off of $1,025 for back rent with a net judgment issued in favor of appellant in the amount of $1,925. The judgment was not appealed. The trial court scheduled a hearing for the issues of punitive damages and attorney fees at a later date. At that hearing, the trial court admitted into evidence an affidavit from appellant that 86.8 hours were exended on the case-in-chief including trial and an additional 17 hours expended on post-trial matters, i.e., punitive damages and attorney fees. Appellee's own witnesses [*4] testified to hourly rates of $75 and $90 for representation in landlord-tenant matters and appellant's rebuttal witness, Attorney Robert C. Urban, Jr., an attorney for 7 years and then president of the Tuscarawas County Bar Association, testified that "certainly $75 per hour is a reasonable hourly rate in this community." After the parties filed briefs on the matter the trial court issued its judgment entry holding:

The court finds that the plaintiff has incurred attorney fees and determines the reasonable amount therefore to be $3632.00. The court finds that such attorney fees are reasonably related to plaintiff's claim brought under Ohio Revised Code 5321.04(B) upon the time spend of 86.8 hours with an in-court time of 16 hours at $50.00 per hour and 70.8 hours of out--of-court time at $40.00 per hour.

The court then entered judgment in favor of southeastern Ohio Legal Services in the amount as stated supra.

Appellant timely requested Civ.R. 52 findings of fact and conclusions of law and by entry filed May 12, 1992, the trial court

ruled that its December 6, 1991 entry cited supra sufficed in that regard. Additionally the entry denied interest upon the amount [*5] of punitive damages.

Appellant raises the following four assignments of error:

I. THE TRIAL COURT ERRED IN FAILING TO AWARD ATTORNEYS' FEES AT THE PREVAILING MARKET RATE OF $75 PER HOUR.

II. THE COURT ERRED IN NOT COMPENSATING COUNSEL FOR THE 17 POST JUDGMENT HOURS SPENT PREPARING AND LITIGATING THE FEE AND PUNITIVE DAMAGES CLAIMS, AND ENFORCING THE JUDGMENT.

III. THE TRIAL COURT ERRED IN FAILING TO AWARD PLAINTIFF JUDGMENT FOR HIS COSTS.

IV. THE TRIAL COURT ERRED IN FAILING TO PROVIDE INTEREST ON THE JUDGMENT.

I

The question raised herein is not the amount of hours (86.8) which the trial court found to be reasonable but simply the hourly rate. It is noteworthy that appellee's exerts did not contest appellant's testimony that $75 per hour for a case of this nature was reasonable and customary for the local community. As stated in its entry, the trial court discounted this uncontroverted evidence in favor of a lower differentiated hourly rate. DR 2-206(B)(3) instructs courts and attorneys to base a request as the one herein on "the fee customarily charged in the locality for similar legal services." Based upon that admonition and the uncontroverted testimony at hearing, [*6] the trial court erred in awarding a lower amount. This first assigned error is sustained.

II

We find this assigned error also to be well taken. Enforcement of the trial court's judgment and litigation of the fee request necessarily included time and expense after trial. As stated by appellant:

Federal courts now routinely include in statutory fee awards the time expended for enforcement of a judgment, and for litigation of the fee request itself.

Appellant's brief at 10.

We see no difference between attorney time spent on enforcing a court's valid judgment and the time previously spent on diligently representing a client to obtain it. Appellant's reliance on Bittner v. Tri-County Toyota (1991), 58 Ohio St.3d 143, is well taken. (Ohio Supreme court adopts same principles used to determine attorney fee awards in federal courts.) Assignment of error II is sustained.

III

As pointed out by appellant, Ohio's appellate courts have generally held that a prevailing party should recover all necessary litigation expenses, unless the expense is unusual or otherwise inequitable to assess against the non-prevailing party. Civ.R. 54(D) provides as [*7] follows:

Except when express provision there for is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs.

The trial court's failure to award plaintiff his costs herein was improper and this third claim of error is sustained.

IV

The trial court explained its denial of interest on the pertinent judgments as follows:

Here, the interest sought is not upon the judgment rendered under O.R.C. Sec. @ 5321.04 but upon punitive damages ordered by the court. The court is of the opinion that punitive damages are not included in the definition of judgment as the same is used in Ohio Revised Code @ 1343.03(A) and therefore that interest may not be attached thereto.

Entry filed 12/6/91.

As pointed out by appellant, R.C. 1343.03(A) uses "sweeping expansive terms" to include not only all judgments, but also "orders of any judicial tribunal for the payment of money. . . ." (Appellant's brief at 15). We concur that an award of punitive damages and attorney fees are such orders, and interest should properly accrue on them by operation of law (R.C. 1343.03(A)). To rule otherwise would be inconsistent and frustrate [*8] the clear legislative intent of R.C. 1343.03. Appellant's assignment of error IV is well taken and is sustained.

For the reasons stated supra, all of appellant's assigned errors are sustained and the judgment of the Court of Common Pleas is reversed.

Gwin, P.J. and

Smart, J. concur.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio, is reversed, and this cause is remanded to that court for judgment consistent with the accompanying Opinion.

William B. Hoffman

W. Scott Gwin

Irene Balogh Smart

JUDGES

Supreme Court, U.S.
FILED
FEB 16 1994
OFFICE OF THE CLERK

No. 93-1158

In The

Supreme Court of the United States

October Term, 1993

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Petitioner,

TRANS WORLD ASSURANCE COMPANY, DONALD S. FLETCHER, and FLETCHER INSURANCE ASSOCIATES,

v.

EMMETT R. DAVIS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WILLIAM H. BLESSING
119 East Court Street
Suite 500
Cincinnati, Ohio 45202
(513) 621-9191

Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Authorities ii

Statement of the Case 1

Reasons for Denying the Petition 6

I. There Is No Split Among The Circuits On Any Issue Decided By The Court Below 6

A. Congress Neither Excluded Corporations From Liability Under 18 U.S.C. § 1962(c) Nor Abrogated Basic Principles Of Agency 8

B. This Court Should Not Engage In A Fact-Finding Exercise To Impeach The Jury's Finding That MONY Particated In The Operation Or Management Of The Enterprise 9

II. This Court Should Not Review A Question Of Ohio Law On Which The Supreme Court Of Ohio Has Spoken Directly Merely On The Speculation That The Ohio Supreme Court Might Change Its Holding 10

Conclusion 12

TABLE OF AUTHORITIES

Page

CASES:

Ashland Oil, Inc. v. Arnett, 875 F.2d 1271 (7th Cir. 1989) 9

Bittner v. Tri-County Toyota, Inc., 58 Ohio St. 3d 143, 569 N.E.2d 464 (1991) 11

Brady v. Dairy Fresh Products Co., 974 F.2d 1149 (9th Cir. 1992) 9

D&S Auto Parts, Inc. v. Schwartz, 838 F.2d 964 (7th Cir.), *cert. denied*, 486 U.S. 1061, 108 S.Ct. 2833 (1988) 9

Hofstetter v. Fletcher, 905 F.2d 897 (6th Cir. 1988) 7

Lorenz v. CSX Corp., 1 F.3d 1406 (3d Cir. 1993) 7

Reves v. Ernst & Young, 113 S.Ct. 1163 (1993) 10

OTHER AUTHORITIES:

18 U.S.C. § 1962(c) 6, 7, 8, 9

Ohio Consumer Sales Practices Act, Ohio Rev. Code § 1345.09(F)(2) 10

Ohio's Code of Professional Responsibility, DR 2-106(B) 11

No. 93-1158

In The

Supreme Court of the United States

October Term, 1993

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Petitioner,

TRANS WORLD ASSURANCE COMPANY, DONALD S. FLETCHER, and FLETCHER INSURANCE ASSOCIATES,

v.

EMMETT R. DAVIS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

The proceedings below addressed a multi-state, fraudulent insurance sales scheme, perpetrated by several insurance agents and insurance companies in the late 1970s and through most of the 1980s. Established in the late 1970s by Donald S. Fletcher, Neil McKelvie, and others, this sales scheme came to be known as the "tax

and insurance program." It operated out of northern California and was targeted at middle-income working people across the United States.

This insurance sales scheme was marketed through hundreds of "tax seminars," presented in scores of United States cities and towns via an organization that came to be known as Fletcher Insurance Associates ("FIA").[1] At those tax seminars, Donald Fletcher and other insurance agents promised prospective clients that income tax liability could be eliminated lawfully and tax audit protection ("prepaid legal care") would be provided to those client investors who would join the program by (1) buying large amounts of life insurance; (2) involving themselves in a home-based business; and (3) turning their tax affairs over to the insurance agents. The insurance agents, along with their purported tax "experts," prepared new IRS W-4 forms[2] and income tax returns for these clients and managed the clients' relationships with the Internal Revenue Service.

The income tax returns were prepared improperly,[3] and, after several years, the Internal Revenue Service and

---

[1] This organization was first called The Fletcher-McKelvie Group (1978-1980). Its name later changed to Fletcher-McKelvie Insurance Associates (1980-1983), and, eventually, it became known as Fletcher Insurance Associates or FIA (1983 onward).

[2] In preparing new IRS W-4 forms, the insurance agents increased tax withholding allowances, thereby effecting reductions in federal income tax withholdings from employee paychecks. Those withholding reductions yielded immediate funds used to pay the insurance companies for the required life insurance policies.

[3] The advertised "tax experts" under contract with FIA to prepare these returns were actually a collection of insurance

state tax authorities conducted audits of the returns. When the lengthy audit process was completed, the Internal Revenue Service and state authorities assessed the Respondents and other victims with hundreds of thousands of dollars in additional taxes, penalties, and interest.

Participation in this scheme by Petitioner Mutual Life Insurance Company of New York ("MONY") began in 1980, when the company named Donald Fletcher and several of Fletcher's collaborators as agents for MONY and provided office space for FIA. Fletcher and his collaborators had been fired in mid-1980 by New York Life for the fraudulent activities attendant to this same tax and insurance program. MONY's embrace of Fletcher and this sales scheme came after a MONY-employed attorney had conducted a lengthy investigation on Fletcher, FIA, and the tax seminars and submitted a written report, concluding that the scheme was illegal and a "fast-track hustle" but, nonetheless, could be an "excellent marketing tool." MONY's executives disregarded these warnings, opting to make Fletcher and six of his collaborators MONY insurance agents. MONY then assisted Fletcher and FIA in marketing this sales scheme on a near-nationwide basis.

MONY was well aware that the scheme involved fraudulent preparation of tax returns by the purported tax "experts," and MONY took steps to advance the scheme. When one California attorney/tax preparer

---

agents, a disbarred lawyer, and others who formed different business entities each year to avoid detection by the Internal Revenue Service.

balked at the fraudulent tax preparation methods and began to warn MONY policyholders about the false tax information they had received, MONY's executives reacted with threats against the tax preparer, demanding that he cease those communications with policyholders. MONY threatened to have this tax preparer disbarred as an attorney if he continued warning policyholders.

MONY's executives and even its board chairman received numerous complaints and warnings about this program. These complaints came from policyholders across the nation who had been defrauded and also from MONY agents. One MONY agent, who had serious misgivings about the tax and insurance program, approached her agency manager, provided him with a tape recording of one of the tax seminars, and voiced her concerns about the fraud. When those concerns were relayed to MONY's Regional Vice-President, his only response about the program was: " 'Well, it's working all over the place. It's great. We're – we're – it's making us money.' "

Misstatements in MONY's Petition.

There are several misstatements of fact which appear in MONY's Petition.

1. First, MONY's statements that "Fletcher Insurance Associates" became a part of the MONY corporate entity are incorrect and contrary to the record. FIA was an unincorporated association of numerous individuals – a *de facto* partnership. FIA had its own board of directors and was a company separately registered with the State of California. It issued its own business cards and office

stationery and published its own newsletters. This organization conducted tax seminars and agent training seminars across the nation. It entered into written and oral contracts with tax preparation operations. The record shows that FIA was never merged with MONY; nor was it ever purchased or otherwise acquired by MONY. MONY never listed FIA as its asset and, otherwise, never identified FIA as a part of MONY. In a document issued by MONY's Regional Vice-President, MONY certified that this organization was a business entity separate from MONY. The MONY certification identified FIA as a "partnership," whose principals were Donald S. Fletcher and Neil McKelvie. The document identified FIA as being registered with the California Insurance Department and as a separate business entity to which MONY provided financial and non-financial assistance.

FIA existed as a separate entity before its principals (Donald Fletcher and Neil McKelvie) were affiliated with MONY; it existed separately during the time of their affiliation with MONY; and it maintained a separate existence after they ceased their affiliation with MONY. Indeed, throughout the trial below, MONY vigorously argued and presented testimony that Donald Fletcher and Fletcher Insurance Associates were separate and distinct from MONY. To that end, in closing argument MONY's lawyer underscored the evidence that FIA and MONY were distinct entities, as he told the jury during his closing statement: "Fletcher was CEO of some organization – it wasn't Mutual of New York."

2. MONY's second misstatement of fact is its assertion that "the respondents knowingly filed exaggerated and misleading tax returns with the Internal Revenue

Service." Petition, at 4. This was a trial contention by MONY that the jury rejected. In fact, the jury found that it was MONY and the other defendants who had knowingly defrauded each of the respondents. That finding formed the basis of the fraud judgments against MONY.

3. Third, MONY misstates the FIA agents' insurance company affiliations. While Donald Fletcher was an insurance agent for MONY, he was also an insurance agent for Trans World Assurance Co. Some FIA agents were affiliated with MONY, some with TWA, and some simultaneously with both companies. Contrary to MONY's statements, not all FIA agents "signed an agreement to be exclusively a MONY agent." Many FIA representatives were never agents of MONY at all, underscoring that FIA was an entity distinct from MONY.

REASONS FOR DENYING THE PETITION

I. There Is No Split Among The Circuits On Any Issue Decided By The Court Below.

The facts of this case do not support the first question on which MONY seeks review. The Court of Appeals for the Sixth Circuit did not make any decision in this case which conflicts with a holding of another court of appeals. The question around which MONY has attempted to frame a conflict between the circuits is whether or not a parent corporation is sufficiently distinct from one of its corporate divisions, employees, or subsidiaries to be a separate "person" under 18 U.S.C.

§ 1962(c).[4] While the issue of "distinctness" between a parent corporation and its division, subsidiary, or employee may be a real question in some cases,[5] it does not exist here. The issue was not even raised at trial.

During that trial, MONY asserted that Fletcher was an independent contractor and that FIA was a business entity separate and apart from MONY.[6] MONY's position on appeal and in its Petition reflects an effort to reformulate its trial posture. MONY's current assertion – that FIA was a *de facto* division or part of MONY – is a factual

---

[4] The court below recognized that, under 18 U.S.C. § 1962(c), the defendant "person" must be separate and distinct from the "enterprise" and found that the record supported the jury's finding of distinctness.

[5] *See, e.g., Lorenz v. CSX Corp.*, 1 F.3d 1406 (3d Cir. 1993)(possible for a defendant parent corporation to be a distinct entity from subsidiary "enterprise" but specific facts must be pled to show that the parent played a role in the racketeering activity distinct from its subsidiary's activity).

[6] FIA (including its predecessors-in-name) was also an entity separate and distinct from the person of Donald Fletcher, as the Sixth Circuit held in a related case involving this same scheme:

> Regardless of whether the activities of the Fletcher-McKelvie Group are characterized as being entirely criminal in nature or are only partially so, it was clearly an independent organization through which defendants sold life insurance policies to scores of clients across the country by enticing them with false claims that the clients could reduce or even eliminate their federal income tax liability. Given these circumstances, we find that the Fletcher-McKelvie Group constituted a separate RICO enterprise under any recognized definition of the statutory term.

Hofstetter v. Fletcher, 905 F.2d 897, 903 (6th Cir. 1988).

contention first raised during the appeal of this case as part of MONY's effort to avoid liability under RICO. This posture is foreign to the record.

There was abundant evidence in the record to support the properly-instructed jury's finding. The jury could have found that FIA was an entity distinct from MONY. That is the holding of the court of appeals, below. Similarly, under the trial court's instructions, the jury could have found the association-in-fact (among MONY, Fletcher, the tax preparers, FIA, and numerous other identified collaborators) as the enterprise. The jury's finding, the consequent judgment, and the holding affirming it do not create any conflict with any other court of appeals.

A. Congress Neither Excluded Corporations From Liability Under 18 U.S.C. § 1962(c) Nor Abrogated Basic Principles Of Agency.

The court below carefully analyzed the issue of whether principles of *respondeat superior* may apply in 18 U.S.C. § 1962(c) actions to hold a corporation liable for the acts of its agents. Following the holdings of numerous circuits, construing 18 U.S.C. § 1962(c), the court below recognized the near-unanimous rule in the courts of appeals "that plaintiffs may not use RICO to impose liability vicariously on corporate 'enterprises' because to do so would violate the distinctness requirement." That rule does not apply here because MONY was the defendant "person," not an alleged enterprise. As noted above, the Respondents presented abundant evidence at trial that the enterprise (FIA) was distinct and separate from

MONY, and that MONY actively promoted and sponsored the scheme and benefitted from it.

MONY contends that Congress intended to abolish vicarious liability *in toto* in § 1962(c) actions; the sought-for conclusion is that orporations are exempt from § 1962(c) liability. This is not an issue which this Court should address. When the courts of appeals' decisions are examined carefully, no court has endorsed the interpretation that MONY advocates.[7] Congress has given no indication in the statute that the standard rules of agency should be ignored in this case.

B. This Court Should Not Engage In A Fact-Finding Exercise To Impeach The Jury's Finding That MONY Participated In The Operation Or Management Of The Enterprise.

The properly-instructed jury, below, found that MONY had participated in the operation or management of the enterprise. The court below found "abundant evidence" that MONY had "actively promoted and sponsored the scheme and plainly benefitted" from its operation. MONY urges this Court to review the record and conclude that the jury erred in that finding. MONY

---

[7] In *D&S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964 (7th Cir.), *cert. denied*, 486 U.S. 1061, 108 S.Ct. 2833 (1988), the Court of Appeals for the Seventh Circuit suggested that *respondeat superior* principles do not apply to § 1962(c) actions. However, the Seventh Circuit later indicated that the *D&S* language was limited to cases where the RICO defendant ("person") is also named as the "enterprise." *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989). *See also Brady v. Dairy Fresh Products Co.*, 974 F.2d 1149, 1154 (9th Cir. 1992).

also urges this Court to hold that the perpetrators of the instant scheme were "clearly outside their scope of authority as MONY agents" and that MONY's connection to the scheme was comparable to the accountants' role in *Reves v. Ernst & Young*, 113 S.Ct. 1163 (1993).

The large record in this case contains telling evidence that MONY, through executives at the highest level, investigated this scheme, found it to be illegal and a "fast-track hustle," and then knowingly embraced, funded and otherwise sponsored it. MONY participated in its management and operation of the enterprise through its Sales Manager, Donald Fletcher, and through its agency and regional vice-presidents. MONY's regional vice-president gave the "green light" to this operation in writing, and MONY's executives facilitated the operation of the scheme in numerous states. MONY ignored warnings from its own investigator, its own insurance agents, and its own policyholders about the illegalities of the scheme. MONY's executives took steps to issue threats to quiet any dissatisfaction with this program. The jury found that MONY acted intentionally and with malice. This extremely fact-based conclusion by the jury is not an issue of law that this Court should address.

II. This Court Should Not Review A Question Of Ohio Law On Which The Supreme Court Of Ohio Has Spoken Directly Merely On The Speculation That The Ohio Supreme Court Might Change Its Holding.

The Supreme Court of Ohio, in construing the Ohio Consumer Sales Practices Act, Ohio Rev. Code

§ 1345.09(F)(2), explicitly gave trial courts the discretion to enhance the lodestar attorney fees calculation based upon several enumerated factors. *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St. 3d 143, 145, 569 N.E.2d 464 (1991). The *Bittner* case directly addresses the issue of fee enhancement under the very statute under which the trial court used in awarding fees. To be sure, Ohio's approach, authorizing enhancement or reduction based on any or all the factors listed in Ohio's Code of Professional Responsibility, DR 2-106(B) (Appendix, A), differs both from this Court's latest and previous interpretations of various federal attorney fee award statutes. This Court has not relied upon the state attorney disciplinary rules to provide discretionary guidelines for attorney fee modifications. Nonetheless, Ohio is not required to move in lockstep with federal statutory interpretations. It is the prerogative of the Ohio Supreme Court to interpret Ohio's attorney fee award statutes.

The reasons that trial courts, interpreting Ohio law, are authorized to enhance attorney fees include those very reasons used by the district court, below, to support enhancement: (1) the contingent fee nature of the representation; and (2) the attorneys' inability to accept other cases. The highest court in Ohio has spoken directly to this enhancement issue, and it would be inappropriate for this Court to review the state-law-based decision based upon the suggestion that the Ohio Supreme Court might change the state's law.

CONCLUSION

For the reasons set forth above, Respondents submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM H. BLESSING
119 East Court Street
Suite 500
Cincinnati, Ohio 45202
(513) 621-9191

Attorney for Respondents

February 1994

APPENDIX

Ohio Supreme Court Rule IV(1) for the Government of the Bar

Code of Professional Responsibility, as adopted by the Supreme Court of Ohio, October 5, 1970

DR 2-106. FEES FOR LEGAL SERVICES

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.

Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the service.

(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.